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Held, that an allegation in the answer that the attachment suit was still pending on a motion for new trial, and undisposed of, set up no new matter requiring a replication.

In general, any fact which plaintiff is bound to prove in the first instance to sustain his action, is not new matter. In the case supposed, plaintiff, in order to show that defendant had failed to prosecute his action without delay

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and with effect, was bound to prove that the attachment suit had been finally disposed of.—State, to use of Demuth, v. Williams, 210.

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B

BILLS AND NOTES.

1. *Bills and notes — Consideration, sufficiency of.* — Where a promissory note is made in consideration of the assignment, by the payee to the maker, of a contract, and the maker of the note derived under such assignment all the advantages which could flow from a valid and operative assignment, the consideration is sufficient for the note, although the assignor may have had no assignable interest in the contract so as legally to be able to transfer the same.—Hudson v. Busby, 35.
2. *Bills and notes — Indorsers and joint makers distinguished.*—A. drew a bill of exchange upon B., requesting B. to pay to A. (the drawer), or order, the amount of the bill. A. subsequently indorsed it, and, to secure negotiation of the bill, induced C. to add his signature on the back of the bill after A.'s own indorsement. B. subsequently honored the bill, and afterward brought suit against C. for the amount of the bill, as for money paid out at C.'s request. *Held*, that C. was not a joint maker. The bill was payable to the order of the drawer, and the drawer first indorsed it, and then it was indorsed by C., and not till then. He was palpably an indorsee as well as an indorser, and could not be charged in such an action.—Rickey v. Dameron, 61.
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4. *Bills and notes—Days of grace—Protest—Sunday.*—Where there are no days of grace it has been generally held that when a note, by its terms, became due upon a Sunday, it was payable the following Monday. But there never was any question that in ordinary commercial paper entitled to grace, if the last of the three days is Sunday or other great holiday, the holder should make demand upon the secular day next preceding, and, upon non-payment, should at once protest the paper.—*Kuntz v. Tempel*, 71.
5. *Bills and notes, parties to—Indorsers—Joint makers.*—If a promissory note be negotiable in form, and made so in fact by the indorsement of the payee, then all other indorsers, unless the contrary is stipulated, are held as such; but if the note is not negotiable, or be not indorsed by the payee, then, in the absence of an express agreement, the original indorsers are to be treated as makers.—*Id.*
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- his rights are not enlarged by the fact that he claims as payee, and not as transferee or indorsee. Thus, where the makers and indorsers of a note were firms having a common member, the assignee after maturity, of the indorser, could not at law sue the makers, even though he had previously been payee of the note, and claimed as such.—*Calhoun v. Albin*, 804.
9. *Surety — Notice by to sue, when not in writing, is no protection to.*—Notice by a surety on a note to the holder thereof to sue, when not in writing, is not binding upon the holder, either under the statute (Gen. Stat. 1865, p. 406, § 1; Wagn. Stat. 1302, § 1) or at common law; and his neglect to comply with such notice will not release the surety.—*Langdon v. Markle*, 357.
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11. *Promissory notes — Guaranty — Notice not necessary to render guarantor liable, when.*—The words "I assign the within note to A. for value received, and guaranty its prompt and full payment," indorsed by the payee on the back of the note, impose upon the assignor an absolute obligation to pay, and no demand or notice of the maker's default is necessary to render him liable.—*Wright v. Dyer*, 525.

BOATMEN'S SAVINGS INSTITUTION.

See **USURY**, 1.

BONDS, COUNTY.

1. *Equity — County Court, bonds given by for building of county road — Injunction to restrain issue of.*—A bill in equity will not lie to enjoin the assessment, levy and collection of a tax for the purpose of paying bonds given by a County Court for the construction of a county road, as a complete remedy exists at law.—*Steines v. Franklin County*, 167.
2. *County roads — County Courts cannot give bonds for without submitting matter to popular election — Such bonds may be validated in what manner — Construction of statute.*—Section 13 of the act of February 16, 1865, concerning roads and highways (Sess. Acts 1865, p. 120), declared among other things as follows: "Before any expenditures shall be made by County Courts for the purpose contemplated by this act, the County Courts may, for the purpose of information, submit the amount of the proposed expenditures to the votes of the respective counties; * * * and if a majority of the voters shall approve of such proposed appropriation, the court may proceed and improve the roads." * * * Under this act the County Court of Franklin county had no right to proceed of its own motion, without submitting the question to the voters of the county, to give county bonds for the building of a county road.

When the rights of third persons are involved, or the public good requires it, the word *may*, used in a law, should always be construed to mean *shall*.—*Id.*

See **PETTIS COUNTY WARRANTS**; **RAILROADS**, 1, 2, 6.

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See EXECUTIONS, 1, 2, 3.

CONSTITUTION OF MISSOURI.

1. *Constitution, what acts under shall be declared invalid.*—The Supreme Court of this State will never declare an act of the Legislature invalid unless in their judgment its nullity and invalidity are placed beyond a reasonable doubt. It is presumed that they are constitutional unless they manifestly infringe on some of the provisions of the constitution.—*State ex rel. Circuit Attorney v. Cape Girardeau & State Line R.R. Co.*, 468.
2. *Constitution—Special legislation—Amendments to laws passed under old constitution.*—The act of December 31, 1859, incorporating the Cape Girardeau & State Line Railroad, was not void under article IV, § 27, of the present constitution, as being an act of special legislation. That clause was obviously intended to have a prospective operation, and to apply only to laws passed after the adoption of the constitution. And the amendment of February 18, 1869, permitting the company to build the road to the State line through or near Bloomfield, was valid under section 3, article XI, of the constitution, which section empowered the Legislature to make subsequent amendments to charters already in operation.—*Id.*

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See PRACTICE, CIVIL—PLEADING, 4.

CONTRACTS.

1. *Insurance, fire, contract of—What acts essential to.*—The rule of law now is that a contract is complete when its acceptance is forwarded, without reference to the time of its reception. And any appropriate act which accepts the terms as they are intended to be accepted, so as to bind the acceptor, sufficiently evidences the concurrence of the parties. But mere assent, without notice or other appropriate and binding act, is insufficient.—*Lungstrass v. German Ins. Co.*, 201.
2. *Contracts—Unlawful consideration—Money may be recovered back, when.*—Money paid out to be used in efforts to procure pardon for a criminal may be recovered where it appears the efforts were not made and the agreement was unexecuted. The rule that money paid for an unlawful consideration cannot be recovered back applies to executed and not to executory contracts.—*Adams Express Co. v. Reno*, 264.

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3. *Letter of credit — Loan, notice of — Approval and acceptance — Ratification, effect of.*—If, after a loan is made by a bank on a letter of credit, the writer has information thereof, and with full knowledge approves of and assents to the loan, such approval and assent amount to a ratification, and he will be bound thereby.—*Central Savings Bank v. Shine*, 456.
4. *Guaranty, offer of — Notice of acceptance necessary to bind guarantor — What notice reasonable as to time a question for the jury.*—Where an offer or proposal is made by letter to guaranty the payment of future advances to be made to the principal of the guarantor, there should be a distinct notice of acceptance, in order that the guarantor may know distinctly his liability, and may have the means of arranging his relations with his principal, and may take from him security or indemnity.
In an action against the guarantor, a general averment of notice of acceptance by plaintiff is sufficient, and the question whether it be reasonable in point of time, under all the circumstances of the case, is one of evidence, which should be left to the jury under proper instructions from the court.—*Id.*
5. *Contracts with old and infirm persons, where relation of trust exists, presumed to be void.*—Where one stands in relations of trust and confidence with another who is old and failing in mind, the law will presume a contract between them to have been the result of undue influence emanating from the stronger party.—*Cadwallader v. West*, 483.
6. *Contract to convey land — Suit to recover purchase money — Parol contract cannot be substituted for written one.*—In consideration of a certain payment, one made his written agreement to convey a tract of land on receipt of a deed therefor from the State. Failing to receive it, the least he could do was to pay back the purchase money.
The contract indicated an expectation of receiving such a deed in a reasonable time; and in suit to recover back the money it would not be admissible for defendant to show that the purchaser never expected a deed, but only desired possession of the land to enable him to carry away a quantity of timber. This would be, in effect, substituting another and a different contract by parol in the place of the written one.—*Langford v. Caldwell*, 508.
7. *Contracts — Specific performance — Action on parol contract of sale by coparcener — Proof, what essential.*—In action for specific performance of a parol agreement for the sale of real estate, where plaintiff claimed to have gone into possession under the agreement, but was theretofore already in constructive possession, it should appear that after the agreement, acts were done with the privity of the owner of the fee which were inconsistent with the previous holding, and such as to clearly indicate a change in the relations of the parties. And so in an action of this sort by one formerly a coparcener in the land, evidence showing that after the agreement the other coparcener had abandoned his claim; that plaintiff held adversely to him and made valuable and lasting improvements, not expected from his relation to his coparcener, would be important in making out his case.

In such suits the contract should be established by competent proof, and be clear, definite and unequivocal in all its terms. And the declaration even of living parties in regard to it should be cautiously received, much more so

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those of parties deceased. To be entitled to weight, the latter should receive other support.—*Underwood v. Underwood*, 527.

See **BILLS AND NOTES; BONDS, COUNTY; BONDS, OFFICIAL; CONVEYANCES; CORPORATIONS, 4; EJECTMENT, 1; FRAUDULENT CONVEYANCES; INSURANCE, FIRE; LANDLORD AND TENANT, 4; PARTNERSHIP, 1, 2, 4; PETTIS COUNTY WARRANTS; ST. LOUIS, CITY OF, 1.**

CONVEYANCES.

1. *Conveyances—Sheriff's deed—Amended deed should be made, when—Effect of amendment on former deed—Innocent purchasers, who are.*—It is the right and duty of a sheriff to amend a defective deed when the facts will warrant him in so doing, and the amended deed will relate back to the date of the original one.

In such case the former deed may be first set aside on motion. But the last and correct deed is not void because the imperfect deed was not first set aside.

A purchaser of the land between the date of the first and second deeds will be affected by the latter only where he had either actual notice of the facts therein recited, or notice of such recorded proceedings as would advise him of them.

Where A. purchased at sheriff's sale and went into open, notorious possession of the premises, of which fact B. was aware, but, learning that the title was defective by reason of infirmities in the sheriff's deed, proceeded to bid off the property under another judgment for a nominal sum, to say that B., in such a case, was a stranger, and should be protected as an innocent purchaser from the operation of a second and amended sheriff's deed to A., would confound all ideas as to what constitutes innocence either in an actual or moral sense.—*Thornton v. Miskimmon*, 219.

2. *Conveyances—Covenants, when merely personal.*—Although a deed on its face purports to be made by A., B. and C., "trustees," yet if the covenants of grant, bargain and sale and those of warranty are therein averred to be simply by "the parties of the first part," without further description, the covenants will be held to be merely personal.—*Murphy v. Price*, 247.
3. *Conveyances—Covenants for seizin and quiet enjoyment, how broken.*—The covenants of indefeasible seizin contained in the words "grant, bargain and sell" would be nominally broken in all cases where there was a paramount title, even though the grantee took possession. But where the holder of such title is in possession so as to exclude the grantee, the latter is entitled to full damages, i. e. the purchase money and interest. So with covenant of warranty.—*Id.*

When, at the time of the conveyance, the grantee finds the premises in possession of one claiming under a paramount title, the covenant for quiet enjoyment will be held to be broken without any other act on the part of the grantee or the claimant.

In such cases it is not necessary, in order to recover on those covenants, to prove actual eviction.—*Id.*

4. *Estoppel in pais—Pointing out of wrong lines by grantor—Sale of property, erection of building, etc.*—Where the grantor of certain real estate showed the purchaser the wrong lines, and was cognizant of his acting on that information, and stood silent while a house was being erected and money

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- expended, he thereby directly led the purchaser into a line of conduct prejudicial to his interest, and should not afterward be heard alleging anything to the contrary. Such acts would constitute an estoppel *in pais*.—*Rutherford v. Tracy*, 325.
5. *Conveyances — Description by lot should prevail over that by courses and distances.*—Where the granting clause of a deed designated the property conveyed as "lot number 3 in block 87," of a certain town, and afterward described it by metes and bounds which embraced an area less than the lot, the legal inference or presumption was that the grantor conveyed the whole lot, and attempted to give it a more particular description by bounding it with courses and distances. The designation of the number of the lot had the same effect as that of a fixed monument, and prevailed over an inconsistent description by courses and distances, there being nothing to show that the grantor designed to reserve or carve out any part of the lot. Had the grantor in his deed used any apt or appropriate words showing that it was not his intention to convey the whole lot, effect should be given to them and that, without regard to any mere verbal position they might occupy in the deed.—*Id.*
 6. *Conveyances — Acknowledgment, defective, what.*—A certificate of acknowledgment which omits the word "acknowledged," and contains no word or words expressive of an equivalent idea, is fatally defective.—*Cabell v. Grubbs*, 353.
 7. *Conveyances — Sheriff's deed, defective acknowledgment of — Not aided by record.*—The record of a certificate of acknowledgment to a sheriff's deed, made by the clerk of a Circuit Court (Wagn. Stat. 612 § 56), is inadmissible to sustain an original acknowledgment thereof, where the latter was defective.—*Samuels v. Shelton*, 444.
 8. *Conveyances — Acknowledgment — Clerical error.*—A certificate of acknowledgment indorsed on the back of a sheriff's deed is not invalid because it recited that "he appeared in court and acknowledged that he executed and delivered a deed for the uses," etc., and did not specifically refer to the deed acknowledged. No material or necessary part of the certificate was omitted, and the intention was sufficiently clear on the face of the paper.—*Id.*
 9. *Conveyances — Seal — Scrawl sufficient.*—In a sheriff's deed, a scrawl appended to his name, with the word "seal" written therein, is, under the laws of this State, a sufficient seal.—*Id.*
 10. *Sheriff's deed prima facie evidence of the truth of its recitals.*—Where execution issues from the circuit clerk's office on a justice's transcript, and the land is sold by the sheriff, the recitals in his deed are *prima facie* evidence of the judgment and execution in the justice's court, and of the other facts recited, without the necessity of producing the transcript to prove the facts. But the recitals may be invalidated or destroyed by the party resisting the deed.—*Id.*
 11. *Conveyance — Acknowledgment of by deputy sheriff in his own name invalid.*—An acknowledgment to a deed, of land sold under execution, made by a deputy sheriff in his own name, is invalid.—*Id.*
 12. *Deeds — Adequacy of consideration — Courts will not look into, except where inadequacy is coupled with mental imbecility.*—Courts look into the adequacy of consideration only under peculiar circumstances, as where one

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of the parties to a contract, at the time of its execution, was laboring under mental weakness induced by old age, sickness, or other cause. In such cases courts of equity will investigate the consideration and determine its sufficiency, and pass upon the party's mental state and condition; and if two facts concur, viz: inadequacy of consideration and mental imbecility, although the weakness of the mind does not amount to idiocy or legal incapacity, the contract or deed will be annulled at the instance of the proper party. In such cases it is not necessary to show that the party was actually misled by fraud or undue influence.—*Cadwallader v. West*, 483.

13. *Equity — Deed — Consideration — Gift.*—Equity will not permit a party to take a conveyance for a consideration, and thereafter set up the same conveyance as a gift.—*Id.*
14. *Conveyances — Undue influence, what — Proof of.*—In transactions connected with the transfer of property, the non-intervention of a disinterested third party or independent professional adviser, especially when the donor is, from age or weakness of disposition, likely to be imposed on, the statement of a consideration where there was none, or improvidence in the transaction, are circumstances which furnish a probable, though not always a certain, test of: undue influence or fraud.—*Id.*

See **CONTRACTS**, 6; **EQUITY**, 4; **FRAUDS**, **STATUTE OF**; **FRAUDULENT CONVEYANCES**; **LANDS AND LAND TITLES**, 2, 5; **PRACTICE**, **CIVIL**—**PLEADING**, 14; **SHERIFFS' SALES**, 2.

CORPORATIONS.

1. *Corporations, officers of — Statements by, admissibility of as evidence — Res gestæ.*—Statements by an officer of a corporation, made while he was acting in the course of his official relations, with regard to the then existing state of affairs, become a part of the *res gestæ*, and are clearly admissible as evidence.—*Western Boatmen's Benevolent Association v. Kribben*, 37.
2. *Corporations, officers of — Loan by, of money of the corporation without authority — Responsibility of sureties.*—When an officer of a corporation loans money of the corporation without authority, and has failed to account for it, his sureties are liable thereupon, whether the persons to whom he loaned it are solvent or not.—*Id.*
3. *Corporations, powers of — Liability of agents — Sureties.*—A corporation can only exercise the powers expressly granted by its charter, or necessary to carry out some express power; and therefore a surety for one as agent for a corporation is limited to such acts as the corporation is authorized to require of its agents. But where the corporation grants powers "to buy, exchange, sell, mortgage, transfer, or otherwise use its property," under these powers it might legally loan out its surplus funds, and the right to accept security for such loan follows as a necessary incident; and where gold was deposited with a corporation as collateral security for a loan, the title thereto vested lawfully in the corporation; and where an agent of the corporation converted such gold to his own use, his sureties are liable therefor.—*Id.*
4. *Corporations — Officers, bonds of — Variation in style of office.*—Where an official bond of an officer of a corporation was given for the faithful performance of his duties as treasurer, and the charter designates the officer as "secretary, who shall act as treasurer," *held*, that the sureties on its bond were liable for defalcations which occurred while he was acting as treasurer.—*Id.*

CORPORATIONS—(Continued.)

5. *Corporations — Stock, transfer of title to — Surrender of certificate of stock.*—Although the purchaser of stock in an incorporated company may insist, as a condition precedent to the purchase of the stock, that the certificate be surrendered to the company for cancellation, yet where no such condition was insisted on, and the transfer was in fact made on the books of the company, such assignment would be sufficient without surrender of the certificate to pass the title to the stock.—*Boatmen's Insurance and Trust Co. v. Able*, 136.
6. *Corporations — Railroad — Dissolution — Act to foreclose the State's lien.*—A corporation may be dissolved by a surrender of its franchises, and if a corporation suffers acts to be done which have the effect of destroying the end and object for which it is created, it is equivalent to a surrender of its right.—*Moore v. Whitcomb*, 543.
See RAILROADS.

COSTS.

See PRACTICE, CIVIL — APPEAL, 4, 6, 7; PRACTICE, CRIMINAL, 2.

COUNTIES.

1. *County, liability of for expense of guarding prisoner — Change of venue — Failure of county to build jail.*—Where a prisoner indicted for a felony in one county is removed by change of venue to another, not provided with a sufficient jail, the former county is not liable for the expenses of guarding the prisoner in the latter, when the cost arose from a failure of the county to provide such jail. The county failing to provide the jail must bear the expense. (See Wagn. Stat. 787, §§ 19, 20.)—*Ransom v. Gentry County*, 341.
2. *County, suit by to collect money — Payment may be made to plaintiff's attorney without special authority given him to institute suit.*—In suit by a county for the collection of money, payment may be made by defendant to the lawfully authorized agent and attorney of the county, without proof of any special authority conferred upon the attorney to institute the suit. He was warranted in receiving the money sued for as in other cases.—*Carroll County v. Cheatham*, 385.

See BONDS, COUNTY; COURTS, COUNTY; PETTIS COUNTY WARRANTS;
RAILROADS, 1, 2, 6; REGISTRATION, 1.

COURTS, CLERKS OF.

See OFFICERS, 3; PRACTICE, SUPREME COURT, 1.

COURTS, COUNTY.

1. *County Courts, justices of — Term of office — Districting of counties, effect of.*—Section 1 of chapter 187, Gen. Stat. 1865 (Wagn. Stat. 439), provides that each county, where the court is composed of three justices, may be districted by the County Court into three districts, and each district shall elect and be entitled to one of the justices of the court. Section 2 provides that the term of office shall be six years, and section 3 provides that at the election in 1866 there shall be elected three justices, one of whom shall vacate his office in two, one in four, and one in six years, to be determined by lot, and thereafter there shall be one justice elected every two years. Pursuant to these provisions, in 1866 three justices were elected for Macon county, who proceeded to draw lots and determine their respective terms of office.

COURTS, COUNTY—(Continued.)

Subsequently the court divided the county into three districts, assigning one of the justices to each district. *Held*, that this order districting the county did not vacate the offices of the several judges, but they were entitled to hold their offices until the remainder of the respective terms.—*State ex rel. Attorney-General v. Gilbreath*, 107.

2. *Prohibition, application for writ of against County Court — When court acts in ministerial capacity, refused.*—When it appears from the pleadings, in an application for a writ of prohibition against a County Court, that the proceedings which the petitioners seek to restrain belong exclusively to the administrative and ministerial duties of that court, and do not involve any exercise of the jurisdiction of the court in its judicial capacity, the application will be refused. (*West v. Clark County Court*, 41 Mo. 44, affirmed.)—*Hockaday v. Newsom*, 196.

See ADMINISTRATION, 2; COURTS, PROBATE; SWAMP LANDS, 2, 3.

COURTS, PROBATE.

1. *Courts, Probate — Sale of lands, report of at same term — Impeachment of — Writ of error.*—In case of a sale of land under an order of Probate Court, the title does not pass until the report of the sale and its approval. The proceedings are a nullity, and no title passes if the report is made and the sale approved at the term when the order issued. But in proceedings before the Circuit Court the rule is different. And notwithstanding such premature report, the title will pass until the sale be set aside on appeal, or by direct proceedings instituted for that purpose. The reason for the distinction is based on the fact that where the report is approved in advance of its lawful return, the action of the Circuit Court can, and that of the Probate Court cannot, be reviewed by writ of error.—*State ex rel. Perry v. Towl*, 148.

See ADMINISTRATION; COURTS, COUNTY; WILLS.

CRIMES AND PUNISHMENTS.

1. *Criminal law — Embezzlement — Agency — Purchase of land with title in abeyance.*—An agent who converts to his own use money intrusted to him by his principal for the purchase of land, is guilty of embezzlement. And the case is not altered by reason of the fact that the land contracted for proved to be in litigation, and that the title was for that cause in abeyance.—*State v. Healy*, 531.

See PRACTICE, CRIMINAL.

CRIMINAL LAW.

See PRACTICE, CRIMINAL.

D

DAMAGES.

1. *Damages — Libel — Justification — Close of case, who entitled to.*—When defendants in an action for libel plead justification, that plea does not entitle them to open and close the case. Where, as in such case, the damages are unliquidated, and to be computed by a jury and depend upon proof, the plaintiff is generally entitled to open.—*Buckley v. Knapp*, 152.

DAMAGES—(Continued.)

2. *Damages — Libel — Justification — Want of knowledge of publication of libel.*— Under the statute touching libel (Wagn. Stat. 1021, § 44), defendant may allege both the truth of the matter charged as defamatory and any circumstances in mitigation. But when the defendant bases his whole defense on the truth of the matter charged, testimony showing that the libelous article was published without his knowledge is inadmissible.—*Id.*
3. *Damages — Libel — Newspaper proprietor, responsibility of.*—The proprietor of a newspaper is responsible for whatever appears in its columns. It is unnecessary to show that he knew of the publication or authorized it.—*Id.*
4. *Damages — Malice, express and implied.*—When slanderous words are spoken, or a libelous article is published falsely, the law will imply malice. There is no necessity of proving express malice.—*Id.*
5. *Damages — Libel, vindictive damages allowed in.*—Vindictive damages may be allowed in civil proceedings. In all actions of tort, whether for assault and battery, or for trespass or libel or slander, where there are circumstances of oppression, malice or negligence, exemplary damages are allowed, not only to compensate the sufferer, but to punish the offender.—*Id.*
6. *Damages — Libel — Wealth of defendant may be shown in estimating damages.*—In an action for libel, evidence may be properly introduced to show defendant's wealth as an element in estimating the damages.—*Id.*
7. *Corporations — Railroads — Damages for failure to fence, when plaintiff contracts with company to fence.*—One who had contracted with a railroad company to fence his land along the line of the road, cannot set up the failure of the company to fence that part of its track as ground for action of damages for killing of stock, even though the statute makes it imperative on the company to fence.—*Ellis v. Pacific R.R. Co.*, 231.
8. *Damages — Officers, liability of, for torts of employees — Allegations in action for — What averments necessary.*—A warden or inspector of the State penitentiary will not be liable in damages for the torts of a convict, on the mere averment that they carelessly and negligently suffered the convict to go at large, whereby the injury resulted, etc. Under the statute (Wagn. Stat. 983-5, §§ 2, 5, 6, 17, 25) it was discretionary with the officers to determine how and in what manner convicts employed outside of the penitentiary should be suffered to go at large. And officers acting in a discretionary capacity will not be liable unless guilty of either willfulness, fraud, malice, or corruption; or unless they knowingly act wrongfully and not according to their honest convictions of duty.—*Schoettgen v. Wilson*, 253.

See EXECUTIONS, 3; INJUNCTION, 1, 2; PRACTICE, SUPREME COURT, 2; RAILROADS, 5, 7, 8, 9, 12.

DECISIONS OF SUPREME COURT.

See PRACTICE, SUPREME COURT, 13.

DEDICATION TO PUBLIC USE.

1. *Estoppel — Park — Land dedicated for common, cannot be diverted to other use, when*—Certain land was by its proprietor laid off and dedicated to an incorporated town for the purposes of a public park. The statute was then in force (Wagn. Stat. 1328, § 8) under which the plat, when recorded, was made to vest the title of the property in the town, "in trust for the uses therein named, expressed and intended, and for no other use and purpose." Held, that persons who had purchased and improved adjoining lands on the faith that the park would ever remain a public one, might enjoin the trustees

DEDICATION TO PUBLIC USE—(Continued.)

of the town from diverting the property from its original use and the purpose specified by the donor in the act of dedication, by causing public streets to be run through it.

The act of March, 1869, authorizing them to lay out streets and alleys, appointing commissioners to assess damages to property-holders, etc. (Wagn. Stat. 1315-16, § 7), gave them no such authority. The property was not acquired by right of eminent domain.—*Price v. Thompson*, 361.

DESCENTS AND DISTRIBUTIONS.

See **WILLS**, 4.

DOWER.

1. *Dower — Ejectment — Merger, doctrine of, when applicable.*— Before the assignment of a widow's dower, ejectment will lie on her behalf for the dwelling-house, messuage, etc., of which her husband died seized. (Wagn. Stat. 542, § 21.) And her right will not be defeated by the fact that the husband of her deceased daughter has a life estate in the property, and that the widow is heir to the reversion. Her dower estate in such case will not merge in the reversion, for the doctrine of merger applies only where the less and greater estates come together without any intervening estate.—*Miller v. Talley*, 503.

See **JUDGMENTS**, 5; **LANDS AND LAND TITLES**, 9.

E**EJECTMENT.**

1. *Ejectment, by vendor against vendee — Latter must show payment of purchase money.*— When a party goes into possession under a contract of purchase, and makes default, he is liable to be turned out in an action of ejectment. And in such action by the vendor against the vendee, the latter can only defend his possession by showing a performance of the contract on his part, and that he is not in default.—*Gibbs v. Sullens*, 237.
2. *Dower — Ejectment — Merger, doctrine of, when applicable.*— Before the assignment of a widow's dower, ejectment will lie on her behalf for the dwelling-house, messuage, etc., of which her husband died seized. (Wagn. Stat. 542, § 21.) And her right will not be defeated by the fact that the husband of her deceased daughter has a life estate in the property, and that the widow is heir to the reversion. Her dower estate in such case will not merge in the reversion, for the doctrine of merger applies only where the less and greater estates come together without any intervening estate.—*Miller v. Talley*, 503.

See **LANDS AND LAND TITLES**, 4.

EMBEZZLEMENT.

See **CRIMES AND PUNISHMENTS**, 1.

EMINENT DOMAIN.

1. *Eminent domain — Appropriation of property for local schools constitutional.*— An appropriation of property for the use of a local school (see Wagn. Stat. 1244, 1247, §§ 12, 20; *id.* 327, 328, §§ 3, 4) is an appropriation of it to a public use, within the meaning of section 16, article 1, of the State constitution.—*Township Board of Education v. Hackmann*, 243.

EQUITY.

1. *Equity — Fraudulent conveyances — Sufficiency of consideration.*— A., being the owner of certain land which he occupied jointly with B., sold said land

EQUITY—(Continued.)

in 1861 to C. for \$2,500, and received C.'s notes for the purchase money, secured by deed of trust on the property. On the 12th of February, 1866, some three or four days before a judgment of \$1,200 was rendered against him, A., notwithstanding the conveyance to C., executed a lease of the land to B. for six years, at a rent of \$1,200 for the term, the receipt of which was acknowledged the same day. On the 5th of July, 1866, A. purchased in the name of B. twenty acres of ground from D. and his wife and her trustee, for a nominal consideration of \$2,300, and, in connection with this purchase, transferred the notes and deed of trust from C., then amounting to some \$3,000, to D. or his wife, by her trustee. D. and his wife, in addition to the conveyance of the land, paid \$500 cash, and the half-interest in a growing crop of tobacco on the premises, that interest being valued at \$450. At the same time the lease above mentioned from A. to B. was turned over to D. and his wife, or one of them. D. subsequently enforced the payment of C.'s note by sale under the deed of trust, and purchased the property for himself. *Held*, that the assignment of the notes and deed of trust must be regarded as the consideration paid for the twenty acres; that the lease assigned, being from one who had no title to the property leased, was of no value, and could not constitute a good consideration for such purchase, and therefore the consideration passed from A.; and under such circumstances the land so purchased in B.'s name will be held to be vested in B. as a secret trustee for A., and to be liable to the demands of A.'s creditors.—*Kehr v. Sichler*, 96.

2. *Equity — Husband and wife — Trustee — Statute of uses.*—A deed of land made on behalf of a husband and wife prior to their marriage, to a trustee for their joint use and benefit, by the terms of which the property was to be afterward conveyed by the trustee in such manner and to such persons as they might appoint, did not create in the trustee a dry trust, which was immediately executed under the statute of uses in the husband. That statute was never intended to apply to such a case.—*Walter v. Walter*, 140.
3. *Husband and wife—Suit by wife against husband may be brought, when.*—A wife may maintain suit against her husband not only where she asks relief in respect to her separate property, or where she seeks a separate provision out of her property; but in other cases she may sue him by her next friend, where he improperly interferes with her rights so as to make it necessary for her to defend herself against his unwarranted claims on her property; as where property held by a trustee for the benefit of herself and her husband jointly, was by the trustee conveyed to her husband absolutely, suit might be brought to reinstate the trust on the ground of fraud, misrepresentation and undue influence. And in reinstating the trust no deduction should be made, on behalf of the husband, of the value of improvements made by him on the property from the rents and profits arising therefrom.—*Id.*
4. *Equity — Action to reform deed — Mistake in description of land in mortgage — Judgment liens — Relief.*—When a deed of trust by mistake omitted to describe certain lands, but the mistake was corrected by the grantor through a new deed, and the land was sold under the latter as well as the former, the sale may be affirmed, and a court of equity will set aside the lien of a judgment on the land, obtained by a creditor with notice, after the first but before the second deed. But such action of the court can only be justified when the mistake clearly appears. No necessity can arise for a re-sale of the property

EQUITY—(Continued.)

where the evidence fails to show that it was sacrificed in consequence of the cloud thrown on the title by the judgment and sale.

Equity may not only enforce liens but remove them when they come in conflict with a superior equity.—*Young v. Cason*, 259.

5. *Chancery—Jury—Issues of fact, submission of to a jury.*—In chancery cases it is better for the court to try the whole case than to submit issues of fact to the jury. But under the statute such issues may, in a proper case, be so submitted. And the exercise of the discretion is not ground for error unless the party has plainly been injured by it. But the court is not bound by the finding, as it would be by a verdict at law. It may adopt it or not, in its discretion.—*Burt v. Rynex*, 309.
6. *Practice, civil—Supreme Court—Chancery—Instructions.*—In purely chancery proceedings, instructions given or refused below are disregarded by the Supreme Court.—*Pixlee v. Walker*, 313.
7. *Equity—Judgment lien not essential to plaintiff's equity.*—Plaintiff in a judgment at law may procure the aid of a court of equity in order to charge the property of defendant, without first securing a judgment lien against it. Although such lien is usually an incident, it is not essential to his equity. (*Glenny v. Freeman*, 44 Mo. 518, affirmed.)—*Alnut v. Leper*, 319.
8. *Equity can be resorted to only after legal remedies have been exhausted.*—Ordinary legal remedies must be shown to have been exhausted to entitle one to his remedy in equity.—*Id.*
9. *Notice sufficient to put one on inquiry sufficient.*—Notice sufficient to put one upon inquiry as to the existence of a right or title, is in law presumed to be notice of such right or title. But such presumption may be repelled by proof that he failed to discover such right notwithstanding the exercise of due diligence.—*Rhodes v. Outcalt*, 367.
10. *Mortgages and deeds of trust—Mistake in description—Grantee treated in equity as purchaser of land intended to be conveyed—Rights of purchaser having knowledge of mistake—What facts sufficient to put upon inquiry.*—A. owned city property designated as "lots 10, 11 and 12, in block 7." He made a deed of trust intending to convey the same, but, by mistake, the land described in the deed was lots of corresponding numbers in block 6, wherein he owned no real estate.
Held, 1st, that notwithstanding said false description, the grantee in equity actually secured a lien on the property intended to be conveyed; and not a lien merely, but his rights were such that he would be regarded in the light of an actual purchaser. The debtor was bound in conscience to correct the mistake. And his obligation to correct it was such an equity as would bind his heirs, voluntary grantees and purchasers with notice. 2d, that where a creditor of A. subsequently had the land in block 7 sold under a judgment against A., and bought it in—knowing, at the time, of the deed of trust, and of the fact that A. owned the property sold, and not that in block 6—the purchaser had knowledge sufficient to put him on careful and diligent inquiry as to the rights of the grantee in the deed of trust, and that he bought subject to the lien of that deed.—*Id.*
11. *Equity—Title bond—Deed of trust, sale under after death of grantor—Purchase at by wife—Equity of wife, etc.*—B. gave to M. a title bond to certain land, and the wife of M., from her own estate, made partial payment

EQUITY—(Continued.)

of the purchase money, and added valuable improvements to the land. Afterward M. gave B. a trust deed on his equity in the property to secure the payment of the balance of the purchase money, remainder over to his wife. After M.'s death the lots were sold under the deed of trust to satisfy the unpaid notes, and most of them were bid in by the wife for herself, with her own means, at a price sufficient to pay the notes. B. then executed a deed for the whole to the heirs of M. Suit was brought against the widow by the purchaser at the administrator's sale of the interest of M. in the property, for the title thereto. *Held*, that it was properly dismissed, because, first, if the deed from B. conveyed his title it went to the heirs of M., and the judgment against the widow could only cut off her equity; second, as against her there was no equity. All the money that went for the purchase and improvement of the property belonged to her; and when M. conveyed his equity in trust for the payment of the purchase money, remainder to his wife, it was not a settlement in fraud of creditors, but a simple act of justice, and did not create a resulting trust in their favor.—*Buckner v. Stine*, 407.

12. *Assignment—Fraud cannot be inferred from merely because assignor was in debt.*—Fraud cannot be inferred from the transfer of property merely because the maker of the deed was at the time in debt.—*Id.*
13. *Equity—Notice—Lis pendens.*—The pendency of a suit is not such notice to one not served with process, and not appearing, that a decree therein will bind him.—*Samuels v. Shelton*, 444.
14. *Equity—Deed—Consideration—Gift.*—Equity will not permit a party to take a conveyance for a consideration, and thereafter set up the same conveyance as a gift.—*Cadwallader v. West*, 483.
15. *Equity—Statute of frauds—Accord and satisfaction.—Receipt—Action barred by.*—A receipt expressed to be in satisfaction of "all claims and demands," if not competent to prove a sale or conveyance under the statute of frauds (*Wagn. Stat.* 655, § 2), is evidence of an accord and satisfaction; and, when coupled with the payment of money, would bar an action in equity, based on prior claims or demands, for a recovery of an interest in the lands of the party paying the money and holding the receipt.—*Grumley v. Webb*, 562.
16. *Equity—Statute of frauds—Part performance—Payment—Possession—Vendor cannot invoke the aid of equity, when.*—Even where a parol contract is in the nature of a purchase, and so embraced in the purview of the statute of frauds, if the purchase money is paid and the purchaser is in possession and holds a perfect record title, the vendor cannot invoke the active interposition of a court of equity to recover the property. Such a claim is inequitable and unconscionable, and has no equity which a court of equity will touch.—*Id.*
17. *Contract—Receipt embraces what matters—Construed, how.*—A receipt given in satisfaction of a judgment and "all claims and demands" does not, on its face, include matters not embraced in the judgment. But the receipt must be interpreted and construed from existing facts and in the light of surrounding and cotemporary circumstances. (*Grumley v. Webb*, 44 Mo. 456.) And if the parties to the receipt clearly and manifestly intended to include in

EQUITY—(Continued.)

it other claims besides the judgment, courts will interpret the contract accordingly.—*Id.*

18. *Equity—Statute of frauds—Performance—What acts take case out of—Estoppel.*—An unexecuted agreement for the sale or surrender of an equity may not, under the statute of frauds (Wagn. Stat. 655, § 2), be enforced. But if the holder of an equitable claim receives money in payment for the same from one who has the legal title and the possession, gives him a receipt and discharge, and leaves him in quiet enjoyment of the property—does all things, in short, which could be done in the settlement of his claim—he cannot afterward invoke the statute and say that his discharge was not in writing. His contract is executed, his equity is dead, and he is estopped by his own conduct from further urging his claim. In such case, the possession prior to the settlement having been adverse to the claimant, his subsequent acquiescence in it would have far greater significance than if possession were rightful or held under claimant.—*Id.*

19. *Equity—Statute of frauds—Divestiture of equitable title must be in writing.*—A voluntary divestiture of an equitable estate by the owner, for a valuable consideration, is in the nature of a conveyance of his title by bargain and sale, and under the statute of frauds (Wagn. Stat. 655, § 2) cannot be proved by parol testimony. This proposition of law is sustained by the decision in *Hughes v. Moore*, 7 Cranch, 176. The case at bar is not one executed by possession and turning on part performance.—*Grumley v. Webb* (per Wagner, J., dissenting), 562.

20. *Equity—Statute of frauds—Release proved, how.*—A release is not by act or operation of law, but by the act of the party releasing; and therefore the act can be proved only by a deed or conveyance in writing.—*Id.*

21. *Equity—Legal and equitable transfers.*—No difference in principle can exist between the transfer of a legal and that of an equitable estate.—*Id.*

See CONTRACTS, 5; CONVEYANCES, 12, 14; COURTS, COUNTY, 2; HUSBAND AND WIFE; INJUNCTION; PARTNERSHIP, 1; PARTITION.

ESTOPPEL.

1. *Estoppel in pais—Pointing out of wrong lines by grantor—Sale of property, erection of building, etc.*—Where the grantor of certain real estate showed the purchaser the wrong lines, and was cognizant of his acting on that information, and stood silent while a house was being erected and money expended, he thereby directly led the purchaser into a line of conduct prejudicial to his interest, and should not afterward be heard alleging anything to the contrary. Such acts would constitute an estoppel in pais.—*Rutherford v. Tracy*, 325.

2. *Estoppel—Park—Land dedicated for common, cannot be diverted to other use, when.*—Certain land was by its proprietor laid off and dedicated to an incorporated town for the purposes of a public park. The statute was then in force (Wagn. Stat. 1328, § 8) under which the plat, when recorded, was made to vest the title of the property in the town, "in trust for the uses therein named, expressed and intended, and for no other use and purpose." *Held*, that persons who had purchased and improved adjoining lands on the faith that the park would ever remain a public one, might enjoin the trustees of the town from diverting the property from its original use and the pur-

ESTOPPEL—(Continued.)

pose specified by the donor in the act of dedication, by causing public streets to be run through it.

The act of March, 1869, authorizing them to lay out streets and alleys, appointing commissioners to assess damages to property-holders, etc. (Wagn. Stat. 1315-16, § 7), gave them no such authority. The property was not acquired by right of eminent domain.—*Price v. Thompson*, 361.

See **EQUITY**, 18.

EVIDENCE.

1. *Corporations, officers of—Statements by, admissibility of as evidence—Res gestæ.*—Statements by an officer of a corporation, made while he was acting in the course of his official relations, with regard to the then existing state of affairs, become a part of the *res gestæ*, and are clearly admissible as evidence.—*Western Boatmen's Benevolent Association v. Kribben*, 37.
2. *Attachment—Non-residence—Evidence.*—Upon an issue made by a plea in abatement, in an attachment suit grounded upon alleged non-residence, evidence showing merely that defendant owned property in another State is incompetent, and is properly excluded, unless peculiar circumstances rendering the evidence admissible be first shown to exist.—*Gould v. Smith*, 43.
3. *Practice, civil—Appeal—Supreme Court will not weigh evidence in law cases.*—The Supreme Court will not look into evidence or pass upon its weight in law cases, even where the case was tried by the court below without the aid of a jury.—*Id.*
4. *Evidence—Objections to, must be brought distinctly to the attention of the court at the time.*—Objections to the admission in evidence of a paper, on the ground that it had not been placed on file a certain number of days before the trial, as required by the statute, should be made at the time the evidence is offered, and should distinctly allege the grounds of objection. Trials are to be conducted in good faith, and objections of mere form are to be brought distinctly to the attention of the court, or they should be considered as waived.—*Kuntz v. Tempel*, 71.
5. *Bills and notes—Indorsers in blank—Nature of their liability may be shown by parol testimony.*—When a name is placed upon a note in blank, it is competent to explain the intention and purpose of him who placed it there; and it is proper for the court to hear evidence and decide as to the circumstances and intention. Explanation is not necessarily contradiction; and if the appearance of the paper is consistent with either of two states of facts or intentions, evidence explaining its appearance or showing the intention is admissible. The law only implies a particular undertaking in the absence of an actual one, and when the latter is shown there is no room for the former.—*Id.*
6. *Evidence, formal objections to, insufficient.*—Objections to evidence which are merely formal, specifying no reasons therefor, are uniformly held to be insufficient.—*Buckley v. Knapp*, 152.
7. *Records, lost, ordinarily may be proved by parol evidence.*—Ordinarily, if a record be lost, its contents may be proved, like any other document, by secondary evidence, when the case does not, from its nature, disclose the existence of other and better evidence.—*Foult v. Colburn*, 225.
8. *Will, suit to contest validity of—Wife may testify in.*—In an action to contest the validity of a will, the wife is not precluded from testifying by

EVIDENCE—(Continued.)

reason of anything contained in the statute concerning witnesses (Wagn. Stat. 1872-3, §§ 1-5). That act contemplates cases where the husband is the real party in interest; whereas, in the case supposed, the wife is the real and the husband merely a nominal party.—*Tingley v. Cowgill*, 291.

2. *Witnesses—Medical men cannot give opinions as to the merits of a cause.*—Medical men, when called as scientific witnesses, cannot give their opinions as to the merits of a cause, but their opinions must be predicated upon the facts proved. Where, however, the facts are doubtful, they may be asked their opinions upon a case hypothetically stated.—*Id.*

10. *Evidence—Hearsay—Declarations of persons since deceased.*—The declarations of persons since deceased, against their interest at the time the declarations were made, constitute an exception to the rule excluding hearsay evidence. But to render them admissible it should appear that the deceased knew the facts, or that it was his duty to know them; that his declarations were at variance with his interest at the time they were made. The weight of such testimony is a matter to be determined by the jury.—*Wynn v. Cory*, 346.

See **CONTRACTS**, 7; **LANDLORD AND TENANT**, 2; **PRACTICE, CIVIL—PLEADING**, 6, 8, 14; **PRACTICE, CIVIL—TRIALS**, 5, 6; **PRACTICE, CRIMINAL**, 4, 7, 8; **SHERIFFS' SALES**, 3, 6.

EXECUTIONS.

1. *Executions—Constable—Agency—Sale.*—A constable, having an execution, levied on goods belonging to the debtor, which were being sold at auction. After a conference between the constable, the defendant and the auctioneer, the auctioneer in the constable's presence announced that the matter had been adjusted; that he would proceed with the sale and pay over to the constable sufficient of the proceeds to satisfy the execution. Accordingly the sale proceeded and plaintiff bought goods, for which he paid the auctioneer, and the auctioneer turned the money over to the constable. The constable then produced another execution, hitherto undisclosed, and levied upon the property bought by plaintiff and carried it away. *Held*, that the constable had made the auctioneer his agent in making the sale, and that by subsequently taking possession of the property he disaffirmed the sale and was bound to return the purchase money.—*Thurley v. O'Connell*, 27.
2. *Execution—Constable's bond, action on—Judgment on which execution was based must be proved.*—In suit on a constable's bond for failure to make levy on an execution, defendant cannot call in question the regularity of the judgment on which the execution was founded, but plaintiff must prove that the judgment was rendered.—*State, to use of Liechter, v. Miller*, 251.
3. *Execution—Constable's bond—Action on for failure to levy—Measure of damages.*—In an action on a constable's bond for failure to make a levy on an execution, the measure of damages would be the amount of complainant's actual injury resulting from the negligence or misconduct of the constable, and not the amount called for by the face of the execution.—*Id.*
4. *Attachment, general judgment in—Fieri facias not absolutely void.*—The attachment act of 1825 (R. S. 1825, p. 144 *et seq.*) contemplated a general judgment in attachment suits. But under its provisions, the attached property alone was to be taken on execution. However, a general *fieri facias* on such a judgment would not be absolutely void. It would furnish the

EXECUTIONS—(Continued.)

- sheriff with sufficient authority to levy it upon the property attached.—*Cabell v. Grubbs*, 353.
5. *Execution sale*—Where execution is regular on its face, purchaser cannot be affected, unless the execution is rendered void by the irregularities.—Every reasonable intendment should be made in support of the rights of a purchaser at an execution sale. Where an execution is regular on its face, he cannot be injuriously affected by any irregularities in the proceedings which resulted in the sale, unless they were of a character to render the proceedings wholly void. He certainly cannot in any collateral proceeding.—*Id.*
 6. *Execution*—*Motion to quash*—*Parties*.—Whether any except parties to a record are entitled to submit a motion to quash an execution, questioned.—*Fiske v. Lamoreaux*, 523.
 7. *Execution*—*Judgment, assignment of*—*Money paid in purchase of*.—Where the amount due on a judgment is paid by a third party as consideration for its assignment and not in satisfaction of it, the assignee may sue out an execution on the judgment.—*Id.*

F**FALSE PRETENSES.**

See PRACTICE, CRIMINAL, 6.

FENCES.

See RAILROADS, 3, 4, 5, 7, 8; UNLAWFUL DETAINER, 1.

FOREIGN JUDGMENTS.

See JUDGMENTS, 1.

FORGERY.

See PRACTICE, CRIMINAL, 14.

FRANKLIN COUNTY.

See BONDS, COUNTY, 1, 2.

FRAUDS.

1. *Fraud*—*Sale of land*—*Mere inadequacy of consideration not sufficient to charge fraud*.—Mere inadequacy of consideration in the sale of property, of itself, unless so gross as to furnish a reasonable presumption of fraud, would be no ground for the interference of equity.—*Carter v. Abshire*, 300.
2. *Deed of trust*—*Surplus, payment of*—*Creditor, claim of to surplus by reason of purchase of land and notes*.—A trustee in a deed of trust cannot refuse to pay over to one who has purchased the encumbered property subject to the trust, any surplus after satisfying the trust notes, on the ground that the purchase was without consideration and a fraud upon creditors. Until set aside in a direct action by the creditors, such sale will stand, and strangers will not be permitted to prove the fraud. And he cannot refuse so to pay over the surplus on the ground that the purchaser at the trust sale had already become the owner of the land and the assignee of the notes, and thus claimed to be entitled to the money. The rights of the creditor cannot be passed upon in this collateral manner.—*Reid v. Mullins*, 344.
3. *Contracts with old and infirm persons, where relation of trust exists, presumed to be void*.—Where one stands in relations of trust and confidence

FRAUDS—(Continued.)

with another who is old and failing in mind, the law will presume a contract between them to have been the result of undue influence emanating from the stronger party.—*Cadwallader v. West*, 483.

4. *Deeds—Adequacy of consideration—Courts will not look into, except where inadequacy is coupled with mental imbecility.*—Courts look into the adequacy of consideration only under peculiar circumstances, as where one of the parties to a contract, at the time of its execution, was laboring under mental weakness induced by old age, sickness, or other cause. In such cases courts of equity will investigate the consideration and determine its sufficiency, and pass upon the party's mental state and condition; and if two facts concur, viz: inadequacy of consideration and mental imbecility, although the weakness of the mind does not amount to idiocy or legal incapacity, the contract or deed will be annulled at the instance of the proper party. In such cases it is not necessary to show that the party was actually misled by fraud or undue influence.—*Id.*

5. *Equity—Deed—Consideration—Gift.*—Equity will not permit a party to take a conveyance for a consideration, and thereafter set up the same conveyance as a gift.—*Id.*

6. *Conveyances—Undue influence, what—Proof of.*—In transactions connected with the transfer of property, the non-intervention of a disinterested third party or independent professional adviser, especially when the donor is, from age or weakness of disposition, likely to be imposed on, the statement of a consideration where there was none, or improvidence in the transaction, are circumstances which furnish a probable, though not always a certain, test of undue influence or fraud.—*Id.*

7. *Trusts and trustees—Trustee's sale—Fraud, proof touching—What insufficient.*—The fact that property was sold by a trustee for a sum less than half its value, and was shortly afterward sold back to him by the purchaser for the same amount, is not sufficient of itself to fix on the trustee the charge of having speculated at the sale in violation of his duty. To that end there should be some proof of an understanding between him and the bidder at or prior to the sale.—*Boehlert v. McBride*, 505.

See EQUITY, 12; PRACTICE, CRIMINAL, 3.

FRAUDS, STATUTE OF.

1. *Equity—Statute of frauds—Accord and satisfaction—Receipt—Action barred by.*—A receipt expressed to be in satisfaction of "all claims and demands," if not competent to prove a sale or conveyance under the statute of frauds (Wagn. Stat. 655, § 2), is evidence of an accord and satisfaction; and, when coupled with the payment of money, would bar an action in equity, based on prior claims or demands, for a recovery of an interest in the lands of the party paying the money and holding the receipt.—*Grumley v. Webb*, 562.
2. *Equity—Statute of frauds—Part performance—Payment—Possession—Vendor cannot invoke the aid of equity, when.*—Even where a parol contract is in the nature of a purchase, and so embraced in the purview of the statute of frauds, if the purchase money is paid and the purchaser is in possession and holds a perfect record title, the vendor cannot invoke the active interposition of a court of equity to recover the property. Such a claim is inequitable and unconscionable, and has no equity which a court of equity will touch.—*Id.*

FRAUDS, STATUTE OF—(Continued.)

3. *Equity—Statute of frauds—What acts take case out of—Performance—Estoppel.*—An unexecuted agreement for the sale or surrender of an equity may not, under the statute of frauds (Wagn. Stat. 655, § 2), be enforced. But if the holder of an equitable claim receives money in payment for the same from one who has the legal title and the possession, gives him a receipt and discharge, and leaves him in quiet enjoyment of the property—does all things, in short, which could be done in the settlement of his claim—he cannot afterward invoke the statute and say that his discharge was not in writing. His contract is executed. - His equity is dead.—*Id.*
4. *Equity—Statute of frauds—Divestiture of equitable title must be in writing.*—A voluntary divestiture of an equitable estate by the owner, for a valuable consideration, is in the nature of a conveyance of his title by bargain and sale, and, under the statute of frauds (Wagn. Stat. 655, § 2), cannot be proved by parol testimony. This proposition of law is sustained by the decision in *Hughes v. Moore*, 7 Cranch, 176. The case at bar is not one executed by possession and turning on part performance.—*Id.* (per Wagner, J., dissenting).
5. *Equity—Statute of frauds—Release proved, how.*—A release is not by act or operation of law, but by the act of the party releasing; and therefore the act can be proved only by a deed or conveyance in writing.—*Id.*
6. *Statute of frauds—Sale by parol—Transfer of possession—Payment of purchase money.*—Where an equitable estate is sold by parol, a transfer of possession is essential to take it out of the statute of frauds. The mere payment of the purchase money will not have that effect.—*Id.* 599.

FRAUDULENT CONVEYANCES.

1. *Equity—Fraudulent conveyances—Sufficiency of consideration.*—A., being the owner of certain land which he occupied jointly with B., sold said land in 1861 to C. for \$2,500, and received C.'s notes for the purchase money, secured by deed of trust on the property. On the 12th of February, 1866, some three or four days before a judgment of \$1,200 was rendered against him, A., notwithstanding the conveyance to C., executed a lease of the land to B. for six years, at a rent of \$1,200 for the term, the receipt of which was acknowledged the same day. On the 5th of July, 1866, A. purchased in the name of B. twenty acres of ground from D. and his wife and her trustee, for a nominal consideration of \$2,300, and, in connection with this purchase, transferred the notes and deed of trust from C., then amounting to some \$3,000, to D. or his wife, by her trustee. D. and his wife, in addition to the conveyance of the land, paid \$500 cash, and the half-interest in a growing crop of tobacco on the premises, that interest being valued at \$450. At the same time the lease above mentioned from A. to B. was turned over to D. and his wife, or one of them. D. subsequently enforced the payment of C.'s note by sale under the deed of trust, and purchased the property for himself. *Held*, that the assignment of the notes and deed of trust must be regarded as the consideration paid for the twenty acres; that the lease assigned, being from one who had no title to the property leased, was of no value, and could not constitute a good consideration for such purchase, and therefore the consideration passed from A.; and under such circumstances the land so purchased in B.'s name will be held to be vested in B. as a secret trustee for A., and to be liable to the demands of A.'s creditors.—*Kehr v. Sichler*, 96.

FRAUDULENT CONVEYANCES—(Continued.)

2. *Husband and wife—Fraudulent conveyances—Purchase in the name of the wife, out of the property of her insolvent husband, creates a trust in favor of the husband's creditors.*—Where property is conveyed to a married woman as a cover to enable her husband to hold and enjoy the property through her as his own, if it is shown that the purchase money was in fact paid by him, or that the credit was given to him, the wife should be held to have taken the property in her name for his use, and a trust would result to him for the benefit of his creditors.—*McLaran v. Mead*, 115.
3. *Husband and wife—Fraudulent conveyances—Purchase of property with money raised by a pledge of wife's property, or on credit given to her, does not create a resulting trust for her husband's creditors.*—Where property is purchased in the name of a married woman, with money raised on a note made by her, secured by a pledge of her own property, or by credit given to her on the faith of such a pledge, and not to her husband, and if she designed to purchase for herself, with her own means, and with no fraudulent intent, the fact that the husband signed the note with her and has a marital interest in her property does not create a resulting trust in favor of his creditors. When a married woman is not dealing with her sole and separate estate, so that it becomes necessary that some one else should be a party to the note given to make it valid, and that her husband should join in the deed of trust, the mere fact of such joinder by the husband is not a badge of fraud, but something more should appear—as that the credit was given to the husband, or that he has paid or arranged to pay, in whole or in part, out of his own means.—*Id.*

G

GARNISHMENT.

1. *Garnishment—Wages, payment of.*—A garnishee will not be chargeable for payment of monthly wages to his employee after garnishment, the payments having been made so as to keep the amount due the employee below the value of his services for the thirty days preceding the several payments. (See *Wagn. Stat.* 664, § 37.)—*Davis v. Meredith*, 263.

See PRACTICE, CIVIL—PLEADING, 4.

GOVERNOR.

See OFFICERS, 2.

GUARANTY.

1. *Guaranty, offer of—Notice of acceptance necessary to bind guarantor—What notice reasonable as to time a question for the jury.*—Where an offer or proposal is made by letter to guaranty the payment of future advances to be made to the principal of the guarantor, there should be a distinct notice of acceptance, in order that the guarantor may know distinctly his liability, and may have the means of arranging his relations with his principal, and may take from him security or indemnity.

In an action against the guarantor, a general averment of notice of acceptance by plaintiff is sufficient, and the question whether it be reasonable in point of time, under all the circumstances of the case, is one of evidence, which should be left to the jury under proper instructions from the court.—*Central Savings Bank v. Shine*, 456.

See BILLS AND NOTES, 11.

H

HUSBAND AND WIFE.

1. *Contracts — Bills and notes — Husband and wife — Survivorship.*—Where certain promissory notes, given for rent of land which was the separate estate of a married woman, were made payable to the order of her husband and herself, they were not payable, therefore, to the husband alone, nor were the rents payable to him on the strength of such notes, as his wife's appointee. But these notes were neither real estate nor personal chattels in possession, but choses in action, and the joint payee took them by survivorship.—*Shields v. Stillman*, 82.
2. *Husband and wife — Fraudulent conveyances — Purchase in the name of the wife, out of the property of her insolvent husband, creates a trust in favor of the husband's creditors.*—Where property is conveyed to a married woman as a cover to enable her husband to hold and enjoy the property through her as his own, if it is shown that the purchase money was in fact paid by him, or that the credit was given to him, the wife should be held to have taken the property in her name for his use, and a trust would result to him for the benefit of his creditors.—*McLaran v. Mead*, 115.
3. *Husband and wife — Fraudulent conveyances — Purchase of property with money raised by a pledge of wife's property, or on credit given to her, does not create a resulting trust for her husband's creditors.*—Where property is purchased in the name of a married woman, with money raised on a note made by her, secured by a pledge of her own property, or by credit given to her on the faith of such a pledge, and not to her husband, and if she designed to purchase for herself, with her own means, and with no fraudulent intent, the fact that the husband signed the note with her and has a marital interest in her property does not create a resulting trust in favor of his creditors. When a married woman is not dealing with her sole and separate estate, so that it becomes necessary that some one else should be a party to the note given to make it valid, and that her husband should join in the deed of trust, the mere fact of such joinder by the husband is not a badge of fraud, but something more should appear—as that the credit was given to the husband, or that he has paid or arranged to pay, in whole or in part, out of his own means.—*Id.*
4. *Equity — Husband and wife — Trustee — Statute of uses.*—A deed of land made on behalf of a husband and wife prior to their marriage, to a trustee for their joint use and benefit, by the terms of which the property was to be afterward conveyed by the trustee in such manner and to such persons as they might appoint, did not create in the trustee a dry trust, which was immediately executed under the statute of uses in the husband. That statute was never intended to apply to such a case.—*Walter v. Walter*, 140.
5. *Husband and wife — Suit by wife against husband may be brought, when.*—A wife may maintain suit against her husband not only where she asks relief in respect to her separate property, or where she seeks a separate provision out of her property; but in other cases she may sue him by her next friend, where he improperly interferes with her rights so as to make it necessary for her to defend herself against his unwarranted claims on her property; as where property held by a trustee for the benefit of herself and her husband

HUSBAND AND WIFE—(Continued.)

jointly, was by the trustee conveyed to her husband absolutely, suit might be brought to reinstate the trust on the ground of fraud, misrepresentation and undue influence. And in reinstating the trust no deduction should be made, on behalf of the husband, of the value of improvements made by him on the property from the rents and profits arising therefrom.—*Id.*

- G. *Husband and wife — Marital interest of husband in his wife's property liable for his debts, when.*—The marital interest of the husband in his wife's realty was, before the adoption of the provision contained in section 14, ch. 115, Gen. Stat. 1865 (Wagn. Stat. 935, § 14), liable for his debts not contracted by him prior to his marriage, or as surety, or prior to the time when his wife came into possession of her property. (R. C. 1855, p. 754.)—*Grimes v. Long*, 340.

See DOWER, 1; EQUITY, 11; WILLS, 7, 8.

I**INDORSEMENTS.**

See BILLS AND NOTES.

INFANTS.

See PRACTICE, CIVIL — PARTIES, 1.

INJUNCTION.

1. *Injunction — Delay in sale of personal property — Depreciation — Measure of damages — Construction of statute.* — When delay in the sale of personal property is caused by an injunction, and the depreciation in the salable value of the property is an incident of the delay, the loss, within the meaning of the statute (Wagn. Stat. 1030, § 11), is held to be "occasioned" by the injunction. And the depreciation is the measure of damages.—*Meysenburg, Trustee of Sternberg, v. Schlieper*, 426.
2. *Mortgages and deeds of trust — Injunction to stay — Sale under deed of trust — Action of damage under — Measure of damages* — By the terms of a deed of trust on personal property, upon the non-payment of the first note at maturity all the others became at once due, and the property might be sold to satisfy them. The first note when due was unpaid, and the property was advertised for sale, but the sale was prevented by injunction. Subsequently, before the second note became due, the first note was paid, the injunction was dissolved, and the property, on maturity of the second note, was sold to satisfy the remaining indebtedness. But meanwhile, pending the injunction, the property had greatly fallen in value, and failed to satisfy various encumbrances which had been put upon the property. In an action of damages against the plaintiffs in the injunction, by the holder of a subsequent unsatisfied deed of trust, it was contended by defendants (plaintiffs in the injunction) that an actual sale was a necessary condition to the maturity of the notes not due on their face; and that hence, no sale occurring, they were not responsible for a depreciation in the value of the property up to the time when the second note purported to be due; but held by the court, that defendants having, by their unwarrantable interference, prevented the sale, could not avail themselves of the non-performance which they had occasioned.—*Id.*

See REVENUE, 5.

INSTRUCTIONS.

See PRACTICE, CIVIL — TRIALS, 1, 2, 3.

INSURANCE, FIRE.

1. *Insurance, fire, contract of*—*What acts essential to.*—The rule of law now is that a contract is complete when its acceptance is forwarded, without reference to the time of its reception. And any appropriate act which accepts the terms as they are intended to be accepted, so as to bind the acceptor, sufficiently evidences the concurrence of the parties. But mere assent, without notice or other appropriate and binding act, is insufficient.—*Lungstrass v. German Ins. Co.*, 201.
2. *Insurance, fire, policy of*—*Letter of acceptance by insured not necessary to close contract, when*—*Remittance*—*Failure to remit premium*—*Agency.*—The agent of a fire insurance company, in response to his application therefor, received from it a policy of insurance on his goods. On the day of its receipt he made an entry in his book of accounts with the company of the amount chargeable against him for the premium. The next day the goods were burned. On his announcement of the loss, the company refused to pay on the ground that his premium had not been forwarded. *Held*—
 1. That his entry of indebtedness being made on the receipt of the policy, and in a book in which his accounts with his principal were regularly kept, sufficiently closed his contract, without necessity of forwarding a letter of acceptance.
 2. That inasmuch as his remittances were forwarded only at the end of each month, his failure to pay the amount of the premium before that time did not release the company from its liability.—*Id.*

INTEREST.

1. *Interest*—*Money received by party who improperly applies it to his own use.*—When money is received by a party who applies it to his own use, or otherwise improperly detains it, he should pay the interest upon the money so used or detained.—*Jefferson City Savings Association v. Morrison*, 273.
See USURY.

J

JAIL.

See COUNTIES, 1.

JEOPAILS.

See PRACTICE, CIVIL, 1.

JUDGMENTS.

1. *Foreign judgments, effect of within State*—*Res adjudicata.*—Where a suit was brought in this State on a judgment rendered in another State, and while the suit in this State was pending, defendant filed a petition in the foreign court, where the original judgment was rendered, setting up certain facts and praying that the judgment might be set aside; and the plaintiff filed answer, and the cause was tried and the petition of defendant dismissed. *Held*, that in our court, on trial of the suit brought on the original judgment, the matters set up by defendant, in this petition to have the judgment set aside, were *res adjudicata*, and that defendant could not set up as a defense in the suit on the original judgment the same matters which had been decided against him on his petition to set aside said judgment.—*Poorman v. Mitchell*, 45.

JUDGMENTS—(Continued.)

2. *Wills, proof of—Probate Court, judgment of, how impeached.*—The judgment of a court probating a will is like the judgment of any other court of competent jurisdiction, and cannot be impeached collaterally. It matters not that the court erred, or that the evidence upon which it was founded was not sufficient to justify it. That would simply constitute an error in the proceedings of the court rendering it. But the judgment would be valid until reversed, annulled, or set aside in the proper manner. The evidence is no part of the judgment, and whether it was rendered upon sufficient or legal evidence can only be inquired into by a direct proceeding. The evidence does not confer jurisdiction upon the court; it is merely the means by which the conclusion is arrived at.—*Dilworth v. Rice*, 124.
3. *Practice, civil—Jeofails, statute of—Dismissal and discontinuance.*—Under the statute (Wagn. Stat. 1036, § 19) no judgment, after an actual trial or submission, will be affected by any previous dismissal of the suit. And *semble*, that where parties appear and go to trial after an order of dismissal, it will be presumed to have been set aside.—*Thurman v. James*, 235.
4. *Judgment—Amount recovered stated in numbers, effect of.*—*Semble*, that a judgment expressing the amount recovered simply in figures, in combination with the dollar-mark, thus "\$121.00," is not, within the meaning of the statute (Gen. Stat. 1865, p. 583, § 15; Wagn. Stat. 420, § 15), absolutely void and of no avail in a collateral proceeding.—*Fullerton v. Kelliher*, 542.
5. *Judgment, former, when bar to suit.*—An action to have defendant's dower in certain lands admeasured will be barred by a former judgment between plaintiff's grantor and defendant, based on a proceeding to have dower assigned in the same land.—*Ervin v. Brady*, 560.
6. *Practice, civil—Judgment, finding of facts in.*—A court sitting as a jury is not bound to incorporate in its judgment a finding upon every fact which may arise in the cause.—*Id.*

See ADMINISTRATION, 1; EQUITY, 4; EXECUTIONS, 1, 2, 4, 5, 7; PRACTICE, CIVIL—ACTIONS, 1; PRACTICE, CIVIL—APPEALS, 4, 5.

JURISDICTION.

See PRACTICE, CRIMINAL, 9, 10, 12.

JUSTICES OF THE PEACE.

1. *Justice of the peace—Acts of after expiration of term of office.*—When a justice of the peace continued to act officially after the expiration of his commission, his continued acts *colore officii* within the jurisdiction of a justice *de jure* were valid as to third parties, and could not be collaterally drawn in question.—*State, to use of Liechter, v. Miller*, 251.

See JUSTICES' COURTS.

JUSTICES' COURTS.

1. *Practice, civil—Justices' courts—Appeals—Judgment in the appellate court for an amount exceeding the justice's jurisdiction, improper.*—On an appeal from the judgment of a justice of the peace, a judgment in the appellate court for an amount which, exclusive of interest, exceeds the jurisdiction of a justice's court, is not warranted. The judgment must be limited to an amount within the jurisdiction of the justice.—*Shields v. Stillman*, 82.
2. *Mandamus—Justices' courts—Appeal—Rule and attachment.*—Manda-

JUSTICES' COURTS—(Continued.)

mus will lie only where the relator has a specific right and the law has provided no other specific remedy. The statute (Wagn. Stat. 849, § 10) has provided that if a justice fail to allow an appeal in a case where the same ought to be allowed, or when, from absence, sickness, or other cause on his part, the appeal cannot be taken in time, the Circuit Court, or other court having jurisdiction of such appeals, may by rule and attachment compel the justice to allow the appeal. This is a specific remedy, and there is no necessity to invoke a writ of *mandamus* to secure the appeal, and such a writ is properly refused.—State ex rel. Wheeler v. McAuliffe, 112.

See JUSTICES OF THE PEACE; PRACTICE, CIVIL—ACTIONS, 1; RAILROADS, 5.

L

LANDLORD AND TENANT.

1. *Landlord and tenant—Judgment for rent in a suit for possession under the landlord and tenant act, proper even when it is not asked for.*—Where a plaintiff complies with the statute (Wagn. Stat. 882, § 33) and files the statement therein required, and dispenses with any form of prayer, he is entitled not only to a judgment for possession, but for rent also, and it is the duty of the justice to render such judgment.—Shields v. Stillman, 82.
2. *Leasehold estate—Possession of, prima facie evidence of ownership.*—Possession of a leasehold estate after the death of the lessor, by his heirs, is *prima facie* evidence of their ownership of the same.—Collins v. Banister, 436.
3. *Landlord and tenant—Landlord in possession after abandonment by tenant—Claimant must resort to his action, and cannot intrude without it.*—When a tenant leaves, either at the end of the term or by a surrender of the lease, the landlord comes into sole possession and is possessed of the premises, although not personally present. And it is not the constructive possession alone arising from title, but a real possession arising from his relation of landlord, had when he put the tenant in, held through the tenant, and continued and become exclusive at the termination of the tenancy, and until he has time by his acts to indicate his intentions in regard to the possession. And no one whose claim is *in invitum*—as that of a purchaser of the premises at an execution sale—has the right to enter without first resorting to his action, giving the occupant the advantage of possession and the right to contest the claim. But *semble*, that the rule is different in case of a voluntary grant by the landlord. (*Vide* Pentz v. Kuester, 41 Mo. 447.)—May v. Luckett, 472.
4. *Landlord and tenant—Lease, construction of—Abandonment—Jury—Construction of lease not left to, when.*—A dwelling-house was leased solely on condition that the tenant should continuously occupy and run a saw-mill owned by the landlord. This was the sole consideration of the lease. The instrument contained no condition of forfeiture. *Held*, that an abandonment of the mill was an abandonment of the house, and, at the option of the landlord, terminated the lease.

In suit by the landlord for possession of the dwelling-house, the court should tell the jury what formed the consideration for the lease, as far as shown by

LANDLORD AND TENANT—(Continued.)

the instrument, instead of leaving that point to be determined by the jury.—*Crawley v. Mullins*, 517.

See **LANDS AND LAND TITLES**, 9, 10.

LANDS AND LAND TITLES.

1. *Lands and land titles — Act of Congress of July 4, 1836 — Notice of claim under, sufficiency of.*—In suit for the recovery of land, under the act of Congress of July 4, 1836, plaintiff offered in evidence a written request to the recorder of lands in and for the territory of Missouri, to record all registered concessions found in certain books named, then in his office. But it did not appear that those under whom plaintiff claimed had any agency in giving the notice, nor that any signer of the paper was interested in the lands in question, or that any of them represented those who were or claimed to be so interested. The notice named no claimant and described no land, nor did it intimate that any one was in fact claiming under the concessions referred to. *Held*, that the paper was not such notice of claim as the act contemplated.—*Connoyer v. Schaeffer*, 164.
2. *Lands and land titles — Boundaries — Monuments will not prevail, when.*—Although monuments will generally prevail over other calls in a deed, yet if, taking the whole deed together, they are apparently erroneous, they will be disregarded. And a boundary may be rejected when it is clear that it was inadvertently inserted, and that a tract with different boundaries was intended to be conveyed.—*Jamison v. Fopiano*, 194.
3. *Lands and land titles — Vendor — Levy on interest of vendee for purchase money — Effect as to vendor.*—Where a vendor, under a judgment rendered in his favor for the purchase money of land, levies upon the interest of the vendee and purchases the same at the execution sale, he will stand just where he stood before; the vendee will be entitled to redeem and to have a conveyance upon the payment of the purchase money.—*Pixlee v. Osborn*, 313.
4. *Ejectment — Possession, adverse, what sufficient.*—Possession, to be adverse and bar the original owner, must be actual, open and notorious, under claim of ownership, and continuous and uninterrupted, either in the party holding or his grantor.—*Bowman v. Lee*, 335.
5. *Conveyances — Record — Notice.*—One who has a conveyance from the actual owner of land, directly or through others, is protected under the registry act, although there may have been a previous conveyance, provided such prior deed be unrecorded and he has no actual knowledge of its existence.—*Id.*
6. *Estoppel — Park — Land dedicated for common, cannot be diverted to other use, when.*—Certain land was by its proprietor laid off and dedicated to an incorporated town for the purposes of a public park. The statute was then in force (*Wagn. Stat.* 1828, § 8) under which the plat, when recorded, was made to vest the title of the property in the town, "in trust for the uses therein named, expressed and intended, and for no other use and purpose." *Held*, that persons who had purchased and improved adjoining lands on the faith that the park would ever remain a public one, might enjoin the trustees of the town from diverting the property from its original use and the purpose specified by the donor in the act of dedication, by causing public streets to be run through it.

LANDS AND LAND TITLES—(Continued.)

The act of March, 1869, authorizing them to lay out streets and alleys, appointing commissioners to assess damages to property-holders, etc. (Wagn. Stat. 1315-16, § 7), gave them no such authority. The property was not acquired by right of eminent domain.—*Price v. Thompson*, 361.

7. *Notice sufficient to put one on inquiry sufficient.*—Notice sufficient to put one upon inquiry as to the existence of a right or title, is in law presumed to be notice of such right or title. But such presumption may be repelled by proof that he failed to discover such right notwithstanding the exercise of due diligence.—*Rhodes v. Outcalt*, 367.
8. *Mortgages and deeds of trust—Mistake in description—Grantee treated in equity as purchaser of land intended to be conveyed—Rights of purchaser having knowledge of mistake—What facts sufficient to put upon inquiry.*—A. owned city property designated as "lots 10, 11 and 12, in block 7." He made a deed of trust intending to convey the same, but, by mistake, the land described in the deed was lots of corresponding numbers in block 6, wherein he owned no real estate.

Held, 1st, that notwithstanding said false description, the grantee in equity actually secured a lien on the property intended to be conveyed; and not a lien merely, but his rights were such that he would be regarded in the light of an actual purchaser. The debtor was bound in conscience to correct the mistake. And his obligation to correct it was such an equity as would bind his heirs, voluntary grantees and purchasers with notice. 2d, that where a creditor of A. subsequently had the land in block 7 sold under a judgment against A., and bought it in—knowing, at the time, of the deed of trust, and of the fact that A. owned the property sold, and not that in block 6—the purchaser had knowledge sufficient to put him on careful and diligent inquiry as to the rights of the grantee in the deed of trust, and that he bought subject to the lien of that deed.—*Id.*

9. *U. S. land warrants—U. S. land patents—Patentee dead at time of issue, patent relates back to date of enlistment—Dower.*—Where a land warrant issued from the United States to a soldier for services in the war of 1812, and the patent therefor was made out in his name but after his death, under the acts of Congress (5 U. S. Stat. at Large, 31, 497), the patent will relate back to the date of his enlistment; he will be held to have died seized of the land, and his widow will be entitled to her dower therein.—*Johnson v. Parcells*, 549.
10. *Military bounty warrants are real estate.*—Military bounty land warrants have always been considered real estate, and go, upon the death of the holder, to the heirs at law, and not to the executors or administrators.—*Id.*

See **DOWER**, 1; **EQUITY**, 11; **REVENUE**, 6; **UNLAWFUL DETAINER**, 1.

LAND WARRANTS.

See **LANDS AND LAND TITLES**, 9, 10.

LARCENY.

See **PRACTICE, CRIMINAL**, 5.

LEASE.

See **LANDLORD AND TENANT**, 2, 4.

LETTER OF CREDIT.

See **CONTRACT**, 3.

LIBEL.

1. *Damages — Libel — Justification — Close of case, who entitled to.*—When defendants in an action for libel plead justification, that plea does not entitle them to open and close the case. Where, as in such case, the damages are unliquidated, and to be computed by a jury and depend upon proof, the plaintiff is generally entitled to open.—*Buckley v. Knapp*, 152.
2. *Damages — Libel — Justification — Want of knowledge of publication of libel.*—Under the statute touching libel (Wagn. Stat. 1021, § 44), defendant may allege both the truth of the matter charged as defamatory and any circumstances in mitigation. But when the defendant bases his whole defense on the truth of the matter charged, testimony showing that the libelous article was published without his knowledge is inadmissible.—*Id.*
3. *Damages — Libel — Newspaper proprietor, responsibility of.*—The proprietor of a newspaper is responsible for whatever appears in its columns. It is unnecessary to show that he knew of the publication or authorized it.—*Id.*
4. *Damages — Malice, express and implied.*—When slanderous words are spoken, or a libelous article is published falsely, the law will imply malice. There is no necessity of proving express malice.—*Id.*
5. *Damages — Libel, vindictive damages allowed in.*—Vindictive damages may be allowed in civil proceedings. In all actions of tort, whether for assault and battery, or for trespass or libel or slander, where there are circumstances of oppression, malice or negligence, exemplary damages are allowed, not only to compensate the sufferer, but to punish the offender.—*Id.*
6. *Damages — Libel — Wealth of defendant may be shown in estimating damages.*—In an action for libel, evidence may be properly introduced to show defendant's wealth as an element in estimating the damages.—*Id.*

LIEN, JUDGMENT.

See EQUITY, 4.

LIEN, MECHANICS'.

See MECHANICS' LIEN.

LIMITATIONS.

See CONSTABLES, 1; ESTOPPEL, 1; PRACTICE, CIVIL — PLEADING, 13.

LIQUOR, SALE OF.

See PRACTICE, CRIMINAL, 9, 10, 11, 12.

LIS PENDENS.

See EQUITY, 13.

M**MACON COUNTY.**

See COURTS, COUNTY, 1.

MALICIOUS PROSECUTION.

See PRACTICE, CIVIL — ACTIONS, 2.

MANDAMUS.

1. *Mandamus — Justices' courts — Appeal — Rule and attachment — Mandamus* will lie only where the relator has a specific right and the law has provided no other specific remedy. The statute (Wagn. Stat. 849, § 10) has provided that if a justice fail to allow an appeal in a case where the same ought to be allowed, or when, from absence, sickness, or other cause on his

MANDAMUS—(Continued.)

part, the appeal cannot be taken in time, the Circuit Court, or other court having jurisdiction of such appeals, may by rule and attachment compel the justice to allow the appeal. This is a specific remedy, and there is no necessity to invoke a writ of *mandamus* to secure the appeal, and such a writ is properly refused.—State ex rel. *Wheeler v. McAuliffe*, 112.

2. *Mandamus—Right to office not determined by, when directed to State auditor for warrant of salary.*—The right to an office cannot be determined upon an application for *mandamus* directed to the State auditor for a warrant for a salary.—State ex rel. *Vail v. Draper*, 213.
3. *Mandamus will issue against county judges for payment of warrants drawn on swamp land funds.*—In proceedings before the Circuit Court for *mandamus* against the judges of the County Court, requiring payment of warrants ordered by them and drawn on the "swamp land" fund, where the return sets up no equitable excuse for the conduct of the County Court—as that the warrants had been wrongfully obtained or issued in payment of a claim improperly audited—the writ will issue; and it cannot be objected that no judgment had been first obtained against the County Court on the claim evidenced by the warrants; for being drawn on a special fund, such judgment could not be obtained.

Were the proceedings appealable to the Circuit Court, *mandamus* would not lie; since that remedy is afforded only when others fail. But being an attempt to induce the payment of claims already audited, there was nothing in regard to which an appeal would lie.—State ex rel. *Zimmerman v. Justices of Bolinger County*, 475.

MECHANIC'S LIEN.

1. *Mechanic's lien on frame building would not authorize the sale of the land.*—Under the statute of 1855 (R. C. 1855, p. 1068, § 10), a mechanic's lien simply attaching to a frame building would not authorize the sale of the land.—*Samuels v. Shelton*, 444.

MERCHANTS.

See **SCHOOLS**, 2.

MILITARY OFFICERS.

See **SALES**, 1.

MISTAKE.

See **EQUITY**, 4.

MONUMENTS.

See **CONVEYANCES**, 5; **LANDS AND LAND TITLES**, 2.

MORTGAGES AND DEEDS OF TRUST.

1. *Equity—Husband and wife—Trustee—Statute of uses.*—A deed of land made on behalf of a husband and wife prior to their marriage, to a trustee for their joint use and benefit, by the terms of which the property was to be afterward conveyed by the trustee in such manner and to such persons as they might appoint, did not create in the trustee a dry trust, which was immediately executed under the statute of uses in the husband. That statute was never intended to apply to such a case.—*Walter v. Walter*, 140.
2. *Husband and wife—Suit by wife against husband may be brought, when.*—A wife may maintain suit against her husband not only where she asks relief in respect to her separate property, or where she seeks a separate pro-

MORTGAGES AND DEEDS OF TRUST—(Continued.)

vision out of her property; but in other cases she may sue him by her next friend, where he improperly interferes with her rights so as to make it necessary for her to defend herself against his unwarranted claims on her property; as where property held by a trustee for the benefit of herself and her husband jointly, was by the trustee conveyed to her husband absolutely, suit might be brought to reinstate the trust on the ground of fraud, misrepresentation and undue influence. And in reinstating the trust no deduction should be made, on behalf of the husband, of the value of improvements made by him on the property from the rents and profits arising therefrom.—*Id.*

3. *Equity—Action to reform deed—Mistake in description of land in mortgage—Judgment liens—Relief.*—When a deed of trust by mistake omitted to describe certain lands, but the mistake was corrected by the grantor through a new deed, and the land was sold under the latter as well as the former, the sale may be affirmed, and a court of equity will set aside the lien of a judgment on the land, obtained by a creditor with notice, after the first but before the second deed. But such action of the court can only be justified when the mistake clearly appears. No necessity can arise for a re-sale of the property where the evidence fails to show that it was sacrificed in consequence of the cloud thrown on the title by the judgment and sale.

Equity may not only enforce liens but remove them when they come in conflict with a superior equity.—*Young v. Cason*, 259.

4. *Deed of trust—Sale, notice of—“Public place,” what is.*—The setting up of notice of sale on the sides of a public square in a town or city satisfies the requirement contained in a deed of trust that the notice should be put up in a “public place” in such town or city.

The recitals by the trustee in his deed, that he put up the notices in “public places,” are sufficient *prima facie* evidence of that fact.—*Carter v. Abshire*, 800.

5. *Deed of trust, sale under—When land should be sold in lump, when in parcels.*—When property for sale under a deed of trust will bring more by being sold in separate subdivisions, it is the duty of the trustee to pursue that course, whether the deed contains a direction to that effect or not. But he must sell it in the lump or in parcels, according as will be most beneficial for the debtor; and he will be held to a strict accountability for the exercise of the discretion devolved upon him.—*Id.*

6. *Deed of trust—Surplus, payment of—Creditor, claim of to surplus by reason of purchase of land and notes.*—A trustee in a deed of trust cannot refuse to pay over to one who has purchased the encumbered property subject to the trust, any surplus after satisfying the trust notes, on the ground that the purchase was without consideration and a fraud upon creditors. Until set aside in a direct action by the creditors, such sale will stand, and strangers will not be permitted to prove the fraud. And he cannot refuse so to pay over the surplus on the ground that the purchaser at the trust sale had already become the owner of the land and the assignee of the notes, and thus claimed to be entitled to the money. The rights of the creditor cannot be passed upon in this collateral manner.—*Reid v. Mullins*, 344.

7. *Deed of trust—Advertisement under, what sufficiently accurate.*—An advertisement, under a deed of trust on a certain lot of ground, correctly recited the number of the lot, and further stated that the land was to be sold

MORTGAGES AND DEEDS OF TRUST—(Continued.)

with all the improvements on it, but incorrectly stated the number of houses embraced in it. No attempt was made to show that any one was misled by the advertisement. *Held*, that the advertisement was sufficiently accurate.—*Sumrall v. Chaffin*, 402.

8. *Deed of trust — Sale by trustee — Property should be sold in subdivisions, when.*—It would be the duty of a trustee, in selling a number of tenement houses standing together, to dispose of them singly or to sell the land in parcels less than the whole, if any one desired to purchase in that way, even though the houses were so built together with their walls that the property would not be readily susceptible of a division.—*Id.*
9. *Equity — Title bond — Deed of trust, sale under after death of grantor — Purchase at by wife — Equity of wife, etc.*—B. gave to M. a title bond to certain land, and the wife of M., from her own estate, made partial payment of the purchase money, and added valuable improvements to the land. Afterward M. gave B. a trust deed on his equity in the property to secure the payment of the balance of the purchase money, remainder over to his wife. After M.'s death the lots were sold under the deed of trust to satisfy the unpaid notes, and most of them were bid in by the wife for herself, with her own means, at a price sufficient to pay the notes. B. then executed a deed for the whole to the heirs of M. Suit was brought against the widow by the purchaser at the administrator's sale of the interest of M. in the property, for the title thereto. *Held*, that it was properly dismissed, because, first, if the deed from B. conveyed his title it went to the heirs of M., and the judgment against the widow could only cut off her equity; second, as against her there was no equity. All the money that went for the purchase and improvement of the property belonged to her; and when M. conveyed his equity in trust for the payment of the purchase money, remainder to his wife, it was not a settlement in fraud of creditors, but a simple act of justice, and did not create a resulting trust in their favor.—*Buckner v. Stine*, 407.
10. *Mortgages and deeds of trust — Suit for foreclosure — Party coming in and defending against claim for debt must show his interest — Construction of statute.*—Where, in a suit to foreclose a mortgage, parties are let in to defend under a *prima facie* title, and, in accordance with the provisions of section 7 of the act touching mortgages (Wagn. Stat. 955), answer in bar of the debt secured by the mortgage, their interest in the property encumbered may be put in issue by the pleadings. The requirement to set up their interest is implied from the terms of that section which permit him to become a party at all.
When the mortgage was in fact satisfied, their interest could not be impeached in a direct proceeding by them to avail themselves of their title. In such case the mortgagee would be an intermeddler as between them and others, and would have no interest of his own to protect.—*Bates v. Miller*, 409.
11. *Deed of trust — Assignment — Must be signed by all, etc.*—Certain grantees in a deed of trust conveying real estate, in common with various other creditors of the grantor, signed an agreement releasing him from his indebtedness on his conveyance to them *pro rata* of certain portions of the land embraced in the deed of trust. Some of the grantees therein refused to sign the agreement. Those signing did so with the understanding that the remainder should

MORTGAGES AND DEEDS OF TRUST—(Continued.)

join in it. *Held*, that the signers of the agreement did not thereby lose their rights under the deed of trust, first, because the grantor in the trust deed could pass no title to the land unless all the grantees entered into the agreement; second, because they were not bound by the agreement unless all signed it.—*Barcroft v. Lessieur*, 418.

12. *Mortgages and deeds of trust—Injunction to stay—Sale under deed of trust—Action for damages under—Measure of damages.*—By the terms of a deed of trust on personal property, upon the non-payment of the first note at maturity all the others became at once due, and the property might be sold to satisfy them. The first note when due was unpaid, and the property was advertised for sale, but the sale was prevented by injunction. Subsequently, before the second note became due, the first note was paid, the injunction was dissolved, and the property, on maturity of the second note, was sold to satisfy the remaining indebtedness. But meanwhile, pending the injunction, the property had greatly fallen in value, and failed to satisfy various encumbrances which had been put upon it. In an action of damages against the plaintiffs in the injunction, by the holder of a subsequent unsatisfied deed of trust, it was contended by defendants (plaintiffs in the injunction) that an actual sale was a necessary condition to the maturity of the notes not due on their face, and that hence, no sale occurring, they were not responsible for a depreciation in the value of the property up to the time when the second note purported to be due; but *held* by the court, that defendants having by their unwarrantable interference prevented the sale, could not avail themselves of the non-performance which they had occasioned.—*Meysenburg, Trustee of Sternberg, v. Schlieper*, 426.
13. *Trusts and trustees—Trustee's sale—Fraud, proof touching—What insufficient.*—The fact that property was sold by a trustee for a sum less than half its value, and was shortly afterward sold back to him by the purchaser for the same amount, is not sufficient of itself to fix on the trustee the charge of having speculated at the sale in violation of his duty. To that end there should be some proof of an understanding between him and the bidder at or prior to the sale.—*Boehlert v. McBride*, 505.

N**NEWSPAPERS.**

See **LIBEL**, 3.

NON-RESIDENCE.

See **EVIDENCE**, 2.

NOTICE.

See **EQUITY**, 13; **LANDS AND LAND TITLES**, 5, 6, 7; **MORTGAGES AND DEEDS OF TRUST**, 7, 8.

O**OFFICERS.**

1. *Mandamus—Right to office not determined by, when directed to State auditor for warrant of salary.*—The right to an office cannot be determined upon an application for *mandamus* directed to the State auditor for a warrant for a salary.—*State ex rel. Vail v. Draper*, 213.

OFFICERS—(Continued.)

2. *Officer in by right cannot be ousted by action of governor — Party claiming must resort to quo warranto — Payment, how made by State auditor in case of contest.*—After an officer has received his commission, has been inducted into office, and is in by color of title, he cannot be ousted by the action of the governor, as by the appointment of another in his place. The party claiming the office in such case must resort to *quo warranto*. In making payments under such circumstances, the State auditor is bound to take notice that the incumbent is an officer *de facto*, holding by color of right, and, as such, entitled to his salary until ousted upon proper proceedings.—*Id.*
3. *Officer, acceptance of office incompatible with another office — Offices of county and circuit clerk not incompatible.*—The acceptance, by the incumbent of one office, of another, and one whose duties are incompatible in law therewith, will vacate the former. But the duties of clerk in one court are not incompatible with those of another simply because the two courts may hold their sessions at the same time. The offices of clerk in the Circuit and County Courts having been long and notoriously held in various parts of this State by the same person, without legislation relating thereto, while other offices have been pronounced incompatible, such silence of the Legislature is equivalent to its sanction.—State ex rel. Moore v. Lusk, 242.

See CIRCUIT ATTORNEYS; CONSTABLES; EXECUTIONS; JUSTICES OF THE PEACE; PENITENTIARY; PUBLIC PRINTER; REVENUE, 3, 5; SALES; SECRETARY OF STATE; SHERIFFS' SALES.

ORDINANCES, CITY.

See ST. LOUIS, CITY OF, 1, 2.

P

PACIFIC RAILROAD.

1. *Revenue — Pacific Railroad liable for county taxes — Construction of statute.*—Although, by the amended charter of the Pacific Railroad Company (Sess. Acts 1851, p. 271, § 6) and the laws applicable to said road (Sess. Acts 1853, p. 13, § 12), provision was simply made for the payment by the corporation of State taxes, nevertheless, under the constitution (art. II, § 16) and the general statute (2 Wagn. Stat. 1159-61, §§ 1-9), the company was liable for its county taxes.—State, to use of Pacific R.R., v. Dulle, 282.

See RAILROADS, 1.

PARK.

See DEDICATION TO PUBLIC USE.

PARTITION.

1. *Partition — Petition for, failing to point out each interest, subject to demurrer.*—A petition in a suit for partition, which fails to set forth the ownership of each several interest in the land sought to be divided, and contains no averment that the owner was unknown, or that there was any difficulty in pointing out the owner and defining his interest, is, under the statute (Wagn. Stat. 967, § 8), demurrable for that reason.—Rogers v. Miller, 378.

PARTNERSHIP.

1. *Partnership, what constitutes — Equity — Judgment affirmed.*—A. brought an action in equity against B. to wind up an alleged partnership. There was no written agreement between them. A. testified that they were partners,

PARTNERSHIP—(Continued.)

and B. denied it. Nothing was paid by A. It was known for two years to A. that B. denied the partnership right claimed by him, but he nevertheless allowed the whole matter to sleep until B. had left the State. It was shown that the parties were operating together in some way as to the subject-matter of the alleged partnership; that B. rendered some service in the matter, and A. offered to make compensation for it. *Held*, that in such a case the burden of proving the partnership was on the plaintiff, and the evidence recited was not sufficient to establish it.—*Gatewood v. Bolton*, 78.

2. *Partnership, community of profits essential to.*—An agreement that something shall be done or attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, is the essential characteristic of every partnership agreement.—*Maclay v. Freeman*, 234.
3. *Partnership, what constitutes—Action founded on, nature of suit in.*—A. and B. entered into a contract for the purchase and sale of hogs and cattle. A. was to contribute his services in collecting the stock. B. was to furnish the capital. They were to divide the profits. No special contract was made as to the losses. *Held*, that a community of profits made them jointly liable for the losses; that they were partners, and that suit by A. for his proportion of the profits should have been an application to court for a settlement of partnership accounts, analogous to a late proceeding in chancery.—*Lengle v. Smith*, 276.
4. *Partnership—Individual liability—Partnership articles.*—The articles of partnership of A. & Co. provided that A. should be the financier of the firm and should provide funds for carrying on the business, but should be obliged to use his *individual* name alone for the purpose of procuring money by notes or otherwise, and should be *individually* liable for all debts contracted in that way, and for all loans which might occur in consequence of indorsements made for such purpose. *Held*, that said articles did not authorize A. to bind the firm by notes drawn in his own name, or to involve them as to money borrowed, except when actually embarked in its affairs.—*Dreyer v. Sander*, 400.

See **BILLS AND NOTES**, 8.

PENITENTIARY.

1. *Damages—Officers, liability of, for torts of employees—Allegations in action for—What averments necessary.*—A warden or inspector of the State penitentiary will not be liable in damages for the torts of a convict, on the mere averment that they carelessly and negligently suffered the convict to go at large, whereby the injury resulted, etc. Under the statute (*Wagn. Stat.* 983-5, §§ 2, 5, 6, 17, 25) it was discretionary with the officers to determine how and in what manner convicts employed outside of the penitentiary should be suffered to go at large. And officers acting in a discretionary capacity will not be liable unless guilty of either willfulness, fraud, malice, or corruption; or unless they knowingly act wrongfully and not according to their honest convictions of duty.—*Schoettgen v. Wilson*, 253.

PERJURY.

See **PRACTICE, CRIMINAL**, 4.

PETTIS COUNTY WARRANTS.

1. *Warrants, Pettis county—Made payable out of road and canal fund—Holder must look to that fund only.*—The holder of a Pettis county war-

PETTIS COUNTY WARRANTS—(Continued.)

rant, made payable on its face out of "the road and canal fund" of the county, can look only to that fund for the payment of his claim, and cannot compel the county to pay the warrant out of its own proper funds.

And the liability of the county is not altered even though the road and canal fund may have been diverted from its proper purpose by legislative enactment or the action of the county, where it does not also appear that the county had actually received, or held subject to its control, some portion of that fund which it had not faithfully applied to the payment of the warrant.

The enabling act of March 21, 1868 (Sess. Acts 1868, p. 42), does not relieve the holder of the warrant.—*Kingsbury, Ex'r of Kingsbury, v. Pettis Co.*, 207.

POWERS.

See WILLS, 4.

PRACTICE, CIVIL.

1. *Practice, civil—Jeofails, statute of—Dismissal and discontinuance.*—Under the statute (Wagn. Stat. 1036, § 19) no judgment, after an actual trial or submission, will be affected by any previous dismissal of the suit. And *semble*, that where parties appear and go to trial after an order of dismissal, it will be presumed to have been set aside.—*Thurman v. James*, 235.

PRACTICE, CIVIL—ACTIONS.

1. *Practice, civil—Actions—Suit on judgment before a justice.*—When a debtor in a judgment before a justice has left the county in which the judgment was rendered, the judgment creditor is at liberty to revive his claim by a direct suit upon the judgment itself.—*Wood v. Newberry*, 322.
2. *Practice, civil—Actions for malicious prosecution—Proof of arrest and bail not essential to.*—A civil suit, instituted and prosecuted without probable cause and maliciously, lays a good foundation for a suit for damages, although no arrest attended the prosecution of the malicious suit.—*Brady v. Ervin*, 531.

See CONTRACTS, 7; EJECTMENT, 1; EQUITY; HUSBAND AND WIFE, 5; INJUNCTION; MANDAMUS; PROHIBITION, WRIT OF; QUO WARRANTO RAILROADS, 5; TRESPASS, 1.

PRACTICE, CIVIL—APPEAL.

1. *Practice, civil—Appeal—Supreme Court will not weigh evidence in law cases.*—The Supreme Court will not look into evidence or pass upon its weight in law cases, even where the case was tried by the court below without the aid of a jury.—*Gould v. Smith*, 43.
2. *Practice, civil—Appeal—Motion for new trial not necessary when the error complained of appears on the face of the record.*—When the error complained of is not shown by a bill of exceptions, but appears on the face of the record proper, no motion for a new trial is necessary.—*Ancell v. City of Cape Girardeau*, 80.
3. *Practice, civil—Appeal—Affidavit should be filed, when.*—When the affidavit and bond for an appeal were not filed during the term at which judgment was rendered, the appeal should be dismissed. (Gen. Stat. 1865, ch. 172, § 11; Wagn. Stat. 1059, § 11.)—*Lengle v. Smith*, 276.

PRACTICE CIVIL—APPEAL—(Continued.)

4. *Practice, civil — Judgment for costs — Appeal — Nonsuit.*—A judgment for costs is not a final judgment, and will not support an appeal or writ of error. And the rule holds, although the judgment was rendered on a nonsuit.

Where a nonsuit is taken, in order to justify an appeal or writ of error the judgment should be formally set out, "that it is by the court therefore considered and adjudged that the plaintiff take nothing by his writ, and that the defendant go thereof without day and recover of plaintiff his costs," etc.—*Boggeas v. Cox*, 278.

5. *Practice, civil — Bill of exceptions, judgment must be set out in.*—When the bill of exceptions fails to set out the judgment so as to show whether it was absolute or conditional, interlocutory or final, the appeal will be dismissed.—*Phol v. Bunce, Adm'r*, 289.
6. *Judgment — Costs — Appeal.*—A judgment for costs will not support an appeal or writ of error.—*Preston v. Mo. & Penn. Lead Co.*, 541.
7. *Practice, civil — Judgment for costs not final.*—A judgment for costs only will not support an appeal.—*Zahnd v. Darling*, 557.
8. *Practice, civil — Appeal — Objections — Exceptions.*—Objections not saved by exceptions will not be examined on appeal.—*Id.*

See JUSTICES' COURTS, 1, 2; PRACTICE, CIVIL—TRIALS, 9, 10; PRACTICE, SUPREME COURT; WILLS, 1, 2.

PRACTICE, CIVIL—PARTIES.

1. *Practice, civil — Parties — Minority, motion to set aside judgment on account of.*—Defendant filed a motion for a new trial, accompanied by an affidavit that he was under the age of twenty-one at the time he appeared and entered on his defense, and asked the court to set aside the judgment. *Held*, that the fact that the judgment was against an infant defendant must be shown. The statement that he was under twenty-one years of age when his appearance was entered did not show but that he might have litigated the case for a long time after he became of full age, and before the judgment was rendered against him; and the motion to set aside the judgment and grant a new trial was properly overruled.—*Stupp v. Holmes*, 89.

See PRACTICE, CIVIL—PLEADING, 11.

PRACTICE, CIVIL—PLEADING.

1. *Practice, civil — Pleading — Demurrer by all of several defendants, when the petition shows a good cause of action against some, should be overruled as to them.*—When a petition against several defendants shows a good cause of action against some of them, it should be overruled as to them, although sustained as to the others.—*Ancell v. City of Cape Girardeau*, 80.
2. *Practice, civil — Answer — New matter — Allegations, sufficiency of — Replication.*—In a suit on an attachment bond the petition averred generally that plaintiff in the attachment had failed to prosecute his action without delay and with effect; and further, that a judgment had been rendered for defendant in the transaction on a plea in abatement.

Held, that an allegation in the answer that the attachment suit was still pending on a motion for new trial, and undisposed of, set up no new matter requiring a replication.

In general, any fact which plaintiff is bound to prove in the first instance to sustain his action, is not new matter. In the case supposed, plaintiff, in order to show that defendant had failed to prosecute his action without delay

PRACTICE, CIVIL—PLEADING—(*Continued.*)

and with effect, was bound to prove that the attachment suit had been finally disposed of.—*State, to use of Demuth, v. Williams, 210.*

3. *Practice, civil—Answer setting up new matter should confess and avoid.*—An answer setting up new matter by way of defense should confess and void.—*Id.*
4. *Practice, civil—Pleadings—Answer after demurrer overruled, effect of.*—A defendant who answers upon the merits after demurrer overruled, thereby practically withdraws the demurrer and waives all technical objections to the petition.—*Township Board of Education v. Hackmann, 243.*
5. *Practice, civil—Pleadings—Garnishment—Continuance, affidavit for.*—An affidavit for continuance in the trial of an interplea joined under an attachment suit, which affidavit was entitled as in the cause of the plaintiffs, against garnishees in the attachment, was properly refused.—*Adams Express Co. v. Reno, 264.*
6. *Practice, civil—Pleading—Demurrer waived by answering over.*—Defendant, by answering over after demurrer overruled, practically abandons the demurrer.—*Jefferson City Savings Association v. Morrison, 273.*
7. *Practice, civil—Pleadings—Payments made after pleadings made up—Testimony touching, improper.*—The admission of testimony showing payments made on a debt sued for after the pleadings are made up is clearly erroneous. After-occurrences are not in issue and not open to investigation.—*Sweet, Adm'r of Jones, v. Jeffries, 279.*
8. *Practice, civil—Pleadings—Demurrer, on ground that another suit is pending embracing same parties and cause of action, should be overruled.*—A demurrer to a petition, based on the ground that another suit was then pending between the same parties and for the same cause of action, when no such facts appeared in the petition, should be overruled.—*Arthur v. Rickards, 298.*
9. *Practice, civil—Petition—Failure of to state facts sufficient to constitute a cause of action—In such case all testimony may be objected to.*—An objection to a petition that it does not state facts sufficient to constitute a cause of action, may be taken by objection to the admission of any testimony whatsoever.—*Garner v. McCullough, 318.*
10. *Practice, civil—Petition, averments in, what sufficient.*—In a suit to recover damages for an invasion of plaintiff's possession or right of possession, the petition failing to aver that plaintiff was ever in possession, or that defendant's acts were wrongful, is bad. In such a petition the averment that plaintiff was "entitled to the exclusive possession" of the premises is an assumption of law, and is also bad.—*Id.*
11. *Practice, civil—Demurrer—Objections not specified in will not be noticed on hearing of.*—In passing upon a demurrer, the court will not take notice of defects not therein specified, especially when the pleading can probably be amended so as to make a case or avoid the defect.—*Alnut v. Leper, 319.*
12. *Practice, civil—Pleadings—Demurrer—Improper joinder of parties, who may demur.*—Where there is a joinder of improper parties as defendants, the defendant or defendants improperly joined can alone demur. If other parties join in the demurrer, it should be overruled as to them.—*Id.*
13. *Practice, civil—Pleadings—Demurrer on ground of misjoinder of parties overruled as to those properly joined.*—Demurrer to the petition on the

PRACTICE, CIVIL—PLEADING—(Continued.)

ground of improper joinder of parties defendant should be overruled as to the party or parties against whom a good cause of action has been stated.—*Brown v. Woods*, 330.

14. *Practice, civil—Pleading—Limitations, statute of, to be available should be invoked in the lower court.*—A defendant, in order to avail himself of the statute of limitations, should insist upon it in his defense, and not invoke it for the first time in the Supreme Court.—*Wynn v. Cory*, 346.

15. *Practice, civil—Pleading—Petition—Description of a deed in—Execution—Consideration—Demurrer.*—A petition may describe a deed simply as a "conveyance," and under the statute its execution will be sufficiently implied from that term; and although it fails to allege a consideration of any sort, and fails to aver that the deed was one of gift, yet it will not be for that reason bad on demurrer as not stating a cause of action. The petition would be informal, and might be corrected on motion to make it more definite and certain. But defendant, having waived the informality and gone to trial upon answer, could not afterward say that it set up a void conveyance. And the allegation will be held sufficient to let in evidence and sustain a judgment.—*Poe v. Domec*, 441.

See DAMAGES, 8; PARTITION, 1; RAILROADS, 7, 9; SECRETARY OF STATE, 1; TRESPASS, 1; USURY, 1.

PRACTICE, CIVIL—TRIALS.

1. *Practice, civil—Trials—Declarations of law must be clearly stated.*—All declarations of law should be so clearly stated in the instructions that there can be no substantial danger that the jury will be misled.—*Otto v. Bent*, 23.

2. *Practice, civil—Trials—Inconsistent instructions improper.*—Where two instructions are given which are both correct, but yet are apparently inconsistent or contradictory, it is error. The effect of correct instructions ought not to be impaired by those of an opposite tendency. (*Buel v. St. Louis Transfer Co.*, 45 Mo. 562, cited and affirmed.)—*Id.*

3. *Practice, civil—Trials—Erroneous instructions not affecting the merit of the action, not ground for reversal.*—Instructions which do not materially affect the merits of the action, although erroneous, are not ground for reversing a judgment.—*Id.*

4. *Practice—Trials—Referee, finding by, stands as the verdict of a jury.*—The finding of a referee stands as the verdict of a jury; and when there is any evidence to sustain it, the Supreme Court will suppose that the whole evidence was properly weighed and the requisite effect given to it.—*Western Boatmen's Benevolent Association v. Kribben*, 37.

5. *Practice, civil—Trials—Evidence, objections to should be made when the evidence is offered.*—Objections made to a certain class of evidence, when no evidence for the other side was then before the court for its consideration, are properly overruled; and where, after such objection made and overruled, the other side offered such evidence, and no objection was made, the defendant has no ground of complaint from the overruling of such previous objection.—*Stupp v. Holmes*, 89.

6. *Practice, civil—Trial, waiver of—Entry of waiver on record—Jury, court sitting as, must weigh evidence.*—When plaintiff waives his right to a jury trial, that waiver concludes him; and an entry of such waiver in the

PRACTICE, CIVIL—TRIALS—(Continued.)

record will conclude this court from further inquiry as to the fact of such waiver.

Where jury is waived, the court, sitting as a trier of the fact, must determine the weight of the testimony.—*Henry v. Beers*, 386.

7. *Practice, civil—Trial—Jury—Weight of evidence.*—The jury are the proper judges of the weight and reliability of evidence.—*Kirk v. Sportsman*, 383.
8. *Practice, civil—Verdict—Conclusive on questions of fact.*—On questions of fact in law cases, where the evidence is conflicting, the verdict of the trial court is conclusive.—*Central Savings Bank v. Shine*, 456.
9. *Practice, civil—Evidence—Verdict—Appeal.*—In law cases the Supreme Court will not reverse because the verdict is against the weight of the evidence.—*Wortman v. Campbell*, 509.
10. *Practice, civil—General verdict on different counts improper—Objection to, taken when.*—It is error to render a general verdict where the petition includes several distinct causes of action; but if a party wishes to avail himself of the error, he must, by an appropriate motion, bring the matter before the court trying the cause.—*Bigelow v. North Missouri R.R. Co.*, 510.
11. *Practice, civil—Verdict—Counts—Causes of action.*—Where a petition contains two counts, each embracing a separate cause of action, a general verdict is erroneous. But where the two counts embraced the same cause of action, and plaintiff elected to rest upon one of them, a verdict responsive to that count is proper.—*Ranney v. Bader*, 539.
12. *Practice, civil—Verdict—Surplusage, what may be treated as.*—In rendering judgment on a verdict, the court should reject as surplusage that part of the finding which fixes the amount of interest. It is never held to be error to reject as surplusage any statement in a verdict that does not affect the real finding, and enter judgment upon such finding.—*Id.*

See **LANDLORD AND TENANT**, 4; **PRACTICE, CIVIL—PARTIES**, 1.

PRACTICE, CRIMINAL.

1. *Practice, criminal—Argument by counsel, order of, in discretion of trial court.*—The order in which counsel shall address the jury on the trial of a criminal case is a matter resting in the discretion of the court trying the cause, and unless it appears to have been exercised wrongfully and so as to injure a party, the Supreme Court will not decide that the discretion has been abused.—*State v. Waltham*, 55.
2. *Practice, criminal—Costs bills not presented within two years cannot be allowed by State auditor.*—Section 24, chapter 10, Gen. Stat. 1865 (*Wagn. Stat.* 1336), which provides that "Persons having claims against the State shall exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled and allowed, within two years after such claims shall accrue, and not afterward," applies to fees of circuit attorneys omitted in the original costs bills and demanded on supplementary costs bills, when not presented within two years after the determination of the prosecutions in which the fees accrued; and the law quoted is not repealed as to such items by the act of March 12, 1870 (*Sess. Acts* 1870, p. 29), authorizing a supplemental taxation.—*State ex rel. Johnson v. Draper*, 56.
3. *Practice, criminal—Assault and battery—Prior conviction not a defense when fraudulently obtained.*—A defendant, having committed an assault and

PRACTICE, CRIMINAL—(Continued.)

battery, procured himself to be arrested and fined a small amount. *Held*, that such conviction and fine was not a defense to a subsequent prosecution instituted by the injured party for the same offense. Such action was a mere fraud upon the criminal justice of the State, and cannot be allowed to succeed.—*State v. Cole*, 70.

4. *Practice, criminal—Perjury—Indictment for, must show what—Materiality of testimony.*—Every indictment must contain sufficient allegations to show upon its face that an offense was committed; and in charging perjury it is essential to show that the oath was taken in a material matter. Its materiality must appear from facts set forth in the pleading, and it is not sufficient simply to say that it was material to the issues, without advising the court what those issues were, or what questions arose under them, that it may be seen whether the testimony was material or not.—*State v. Holden*, 93.
5. *Criminal law—Larceny—Indictment—Absence for purpose of avoiding arrest, equivalent to fleeing from justice—Construction of statute.*—Under indictment for larceny the jury were properly instructed that the time during which defendant was out of the State or away from his usual place of abode, for the purpose of avoiding arrest or prosecution, should not be included in the period limited by the statute for the prosecution. Under that law (*Wagn. Stat.* 1120, § 28) absence for the purpose of avoiding arrest would amount to a "fleeing from justice."—*State v. Washburn*, 240.
6. *Practice, criminal—Obtaining money under false pretenses, indictment for—Intent, allegation of, what sufficient—Question of intent for the jury.*—In an indictment under the statute (*Wagn. Stat.* 461, § 47) for obtaining money under false pretenses, it is not necessary to allege the intent of the accused to be to cheat, injure, or defraud any particular person. (See *Wagn. Stat.* 517, § 41.)

In such an action, the principal fact having been proved, the question of intent is one for the jury.—*State v. Scott*, 422.

7. *Practice, criminal—Venue—St. Louis county—City of St. Louis.*—In the trial of a criminal for an offense charged to have been committed in the county of St. Louis, if there is evidence to reasonably satisfy the jury that the crime was committed in the city of St. Louis, the venue will be sufficiently established.—*State v. Burns*, 438.
8. *Practice, criminal—Crime must be shown to be committed within the county—Question of venue for the jury.*—In criminal trials it must always appear that the offense of which the prisoner is convicted is within the jurisdiction of the court. But the question of venue is always a question of fact, and it may be proved like any other fact. If the evidence raises a violent presumption that the offense for which the prisoner is indicted was committed in the county where he is tried, it is sufficient.—*Id.*
9. *Criminal law—Indictment—Selling liquor on Sunday—Form of proceeding—Waiver.*—On indictment for selling liquor on Sunday, defendant submitted himself to the jurisdiction of the court and allowed judgment to go against him by voluntary confession and consent. The court had undisputed jurisdiction of the subject-matter of the indictment. *Held*, that it was competent for defendant to waive an objection urged against the form of the proceeding—as that it was by indictment instead of civil action. And

PRACTICE, CRIMINAL—(Continued.)

- having waived it in the trial court he could not raise it for the first time in the Supreme Court.—*State v. Warnke*, 451.
10. *Criminal law—Indictment—Selling liquor on Sunday—Form of proceeding—Waiver.*—On trial of an indictment for selling liquor on Sunday, defendant, by allowing judgment to go against him by voluntary confession and consent, may waive an objection urged merely to the form of the proceeding—as that it was by indictment and not by civil action. And having waived it in the trial court he cannot raise it for the first time in the Supreme Court. (*State v. Warnke*, *ante*, p. 451, affirmed.)—*State v. Saxauer*, 454.
11. *Criminal law—Selling liquor on Sunday—Offense may be tried before the Circuit Court.*—Under section 32, page 516, Wagn. Stat., the offense of selling liquor on Sunday is not exclusively cognizable before justices of the peace, but may be tried before the Circuit Court.—*Id.*
12. *Criminal law—Misdemeanors—Disturbing public worship, indictable.*—The offense of disturbing a religious congregation (Wagn. Stat. 504, § 30) being punishable by fine and imprisonment (*vide* same section), is an indictable one. The case is distinguishable from that of selling liquor on Sunday, which is punishable by fine only, and under Wagn. Stat. 516, § 29, amenable only to a civil action. (*State v. Huffschtmidt*, 47 Mo. 73.)—*State v. Carter*, 481.
13. *Disturbing public worship—Circuit Court has jurisdiction.*—Of the offense of disturbing a religious congregation (Wagn. Stat. 504, § 30) the Circuit Court has jurisdiction. (Wagn. Stat. 516, § 32; *State v. Warnke*, *ante*, p. 451.)—*Id.*
14. *Criminal law—Uttering forged instrument, what constitutes.*—The offering of a forged instrument, with the representation by words or actions that the same is genuine, is an "uttering" within the meaning of the statute (Wagn. Stat. 471, § 21), whether the paper be accepted or not.
- Questions as to the uttering and the guilty knowledge on the part of the accused are for the jury to determine under the evidence.—*State v. Horner*, 520.
15. *Venue—Question of, one of fact—What proof touching sufficient.*—The question of venue is always one of fact, and may be proved like any other fact. If the evidence raises a violent presumption that the offense for which a prisoner is indicted was committed in the county where he is tried, it is sufficient. (*State v. Burns*, *ante*, p. 438, affirmed.)—*Id.*

See COUNTIES, 1.

PRACTICE, SUPREME COURT.

1. *Practice, Supreme Court—Failure to make out appeal—Neglect of clerk.*—When it appears from the records that appellant has failed to prosecute his appeal within the time required by law, the judgment will, on motion, be affirmed, even though it further appear that the transcript was ordered in time, but that the clerk neglected to make it out. The respondent must not be made to suffer by reason of his failure.—*Redway v. Chapman*, 218.
2. *Practice, Supreme Court—Failure to file transcript—Damages.*—When appellant fails to prosecute his appeal as required by law, and respondent presents to this court a perfect transcript, judgment will, on motion, be affirmed. And when the appeal appears to be taken for delay, ten per cent. damages will be awarded.—*Rice v. McElhannon*, 224.

PRACTICE, SUPREME COURT—(Continued.)

3. *Practice, civil—Supreme Court—Chancery—Instructions.*—In purely chancery proceedings, instructions given or refused below are disregarded by the Supreme Court.—*Pixlee v. Osborn*, 313.
4. *Practice, civil—Supreme Court—Marginal marks no part of a record.*—Marks in the margin of a record, such as the words "given" or "refused," placed beside an instruction in the margin of a transcript, form no part of the record.—*Barbee v. Hereford*, 323.
5. *Practice, civil—Supreme Court may review judgment of Circuit Court rendered on motion, without motion for new trial.*—The Supreme Court may review the decisions of an inferior court rendered on motion—as on a motion to correct a sheriff's return—although no motion for new trial has been made.—*Meek v. Hewitt*, 337.
6. *Practice, civil—Supreme Court will not disturb verdict on questions of fact.*—In cases at law this court will not disturb the verdict of a jury where no legal questions have been raised.—*Blankenship v. North Missouri R.R. Co.*, 376.
7. *Bill of exceptions, what is not.*—A bill of exceptions which does not embody or set out the testimony, but only purports to state the substance of what was proved, is not properly a bill of exceptions at all.—*Id.*
8. *Practice, civil—Supreme Court—Bill of exceptions, refusal of court to sign—Affidavits filed in vacation, etc.*—A bill of exceptions left unsigned by the judge as being untrue and not signed by bystanders, but only accompanied by affidavits sworn to and filed in vacation, and that without any consent that the same should be filed out of time, is not such a bill of exceptions as the law (Wagn. Stat. 1043-4, §§ 28, 30, 32, 34) requires, and the affidavits will not be considered by the court.—*Id.*
9. *Practice, Supreme Court—Law points not saved and no bill of exceptions, judgment affirmed.*—Where no questions of law are raised, and no bill of exceptions is preserved, the judgment will be affirmed.—*Hedges v. North Missouri R.R. Co.*, 382.
10. *Practice, civil—Motion for new trial, assignment of objections in.*—The Supreme Court will not consider objections to the action of the lower court which were not assigned in motion for new trial.—*Cowen v. St. Louis & Iron Mountain R.R. Co.*, 556.
11. *Practice, Supreme Court—Error—Appeal.*—A case showing no writ of error or appeal will be dismissed.—*State v. Griggs*, 557.
12. *Practice, civil—Supreme Court—Res adjudicata.*—When a case has been decided by this court, and again comes here by appeal or writ of error, only such questions will be noticed as were not determined in the previous decision. Whatever was passed upon will be deemed *res adjudicata* and no longer open to dispute.—*Grumley v. Webb* (per Wagner, J., dissenting), 562.
13. *Practice, civil—Supreme Court—Stare decisis.*—Where, upon a second appeal to the Supreme Court, the two records are the same, the former finding should control, unless injustice to the rights of parties would be done by adhering to the first opinion.—*Id.* 559.

See PRACTICE, CIVIL—APPEALS; PRACTICE, CIVIL—TRIALS, 6; PRACTICE, CRIMINAL, 9, 10.

PRESUMPTIONS.

See EQUITY, 9; EVIDENCE.

PRINCIPAL AND AGENT.

See AGENCY.

PRISONERS.

See COUNTIES, 1.

PROHIBITION, WRIT OF.

See COURTS, COUNTY, 2.

PROMISSORY NOTES.

See BILLS AND NOTES.

PROTEST.

See BILLS AND NOTES.

PUBLIC PRINTER.

1. *Public printer — Commissioners, duty of concerning accounts of public printer — Act of March 23, 1870.*—The act of the Legislature of Missouri, approved March 23, 1870 (Sess. Acts 1870, p. 79), entitled "An act to provide for the execution and supervision of the State printing and binding, and abolishing the office of public printer," must be construed as a whole; and the whole structure goes to show that the thirtieth section, which provided that the then State printer should do the State printing and binding until the first Monday in May, 1871, was an afterthought, and practically postponed the taking effect of the system of contracts and competition until May, 1871. The duties of the commissioners, as auditors, related to work let out by them and done under their superintendence, but not to work not done under their letting and direction. Hence they could not be required to audit the accounts of the public printer.—State ex rel. Wilcox v. Wiegel, 29.

Q**QUO WARRANTO.**

See OFFICERS, 2.

R**RAILROADS.**

1. *Pacific Railroad — County subscription — Ownership of stock.*—By the act incorporating the Pacific Railroad (Sess. Acts 1849, p. 222, § 14) the respective counties in which the railroad should be located were authorized to subscribe for the stock of the company and invest the funds of the county therein. The stock was to be held, owned and treated as county property, and the stock subscribed by each county belonged to and is owned by the county, unless its title has been divested by acts and transactions subsequent to the original subscription.—Ridings v. Hall, 100.
2. *Pacific Railroad — County subscriptions — Special taxes — Construction of statute.*—Section 30 of the act of February, 1853, authorizing the formation of railroad associations (Sess. Acts 1853, p. 121), has in view subscriptions made after the passage of said act—not subscriptions made prior thereto. Section 33 of that act, which authorizes the levy of a special tax to pay the interest on bonds theretofore issued, and provide a sinking fund to pay the principal, grants no stock rights to individual tax-payers. The stock subscribed prior to the passage of this act, under the authority of section 14 of the act of 184 (Sess. Acts 1849, p. 222), belonged to the county subscribing it and contracting to pay for it, notwithstanding it may

RAILROADS—(Continued.)

have been paid for by the proceeds of special taxes levied under section 33 of the act of 1853, above quoted.—*Id.*

3. *Corporations — Railroads — Line of track should be fenced through towns and cities, when.*—A railroad company is not excused from fencing the track of its road through a town or city merely because of its passage through such locality, without reference to the question whether it crosses the public highways of a town or city.—*Ells v. Pacific R.R. Co.*, 231.

4. *Corporations — Railroads — Damages for failure to fence, when plaintiff contracts with company to fence.*—One who had contracted with a railroad company to fence his land along the line of the road, cannot set up the failure of the company to fence that part of its track as ground for action of damages for killing of stock, even though the statute makes it imperative on the company to fence.—*Id.*

5. *Railroad — Damages, action for before justice of peace — Averments in.*—In an action against a railroad company, under section 43, chapter 63, Gen. Stat. 1865, before a court of record, for damages to stock, it should appear among other things that the stock strayed on the road through defects of cattle-guards at a road-crossing, or in consequence of the absence of fences which the railroad company was bound to build. But in such action before a justice of the peace, the statement will be sufficient if it advise the opposite party of the nature of the claim, and be sufficiently specific to make the judgment a bar to another suit, although it fail to set forth the averments above mentioned.—*Norton v. Hannibal & St. Jo. R.R. Co.*, 387.

6. *Railroad — Saline county railroad bonds issued without popular vote specifying the amount — Innocent holders protected.*—Under the act of January 22, 1861 (Sess. Acts 1860-1, p. 455), the County Court of Saline county could issue railroad bonds for the Lexington & St. Louis Railroad Company only upon popular vote "specifying the amount" to be issued. (45 Mo. 242.) And the company, being a direct party to the bonds, could enforce their payment only after such vote had been taken. But when the question of the issue of the bonds had been submitted to vote, and a majority had voted for the issue, and the bonds on their face showed a compliance with the act, and said bonds had been negotiated by the county in the construction of the road, purchasers would not be required to look further, and would be entitled to *mandamus* to enforce the payment of said bonds, even though the vote in fact failed to "specify the amount" as required by law.

The general rule is that where the statute gives authority to contract a debt on specified conditions, their performance is necessary to support the authority; and in a direct proceeding to prevent the consummation of the contract, the substantial performance of every radical condition may be insisted on. But when the contract is completed, and the rights of innocent third parties supervene, the rule is relaxed. And in such case, where an attempt has been made to comply with the condition specified, and the bond or other instrument indicates a compliance therewith, the innocent purchaser will be protected.—*State ex rel. Neal v. Saline County Court*, 390.

7. *Railroad companies — Damages, action for against — Negligence, when implied.*—In an action based upon the statute making railroad companies liable for all injury done to stock when their roads were not properly inclosed

RAILROADS—(Continued.)

- with lawful fences (Wagn. Stat. 520, § 5), there is no necessity for alleging or proving negligence. The law in such cases implies negligence.—*Bigelow v. North Mo. R. R. Co.*, 510.
8. *Railroads—Fences, when must be erected by railroad companies building a road—When liable for damages.*—The reasonable construction of the statute relative to fencing lands adjoining railroads (Wagn. Stat. 310, § 43), is that it requires the corporations to have their fences built at least as soon as they commence running their roads; and, although, as a matter of law, it may not be that they are bound to erect fences before or while they are constructing their road through any particular landholder's premises, yet they must act with a prudent regard to the rights of others; and if lacking in this duty they are chargeable with negligence and must answer for the consequences. Thus they are bound while laying their road to use reasonable care to prevent the cattle of others from coming on the adjoining owner's fields and injuring him.—*Comings v. Hannibal & Central Mo. R. R. Co.*, 512.
9. *Railroads—Petition for damages—Allegation as to "road-bed"—Construction of statute—Demurrer—Double damages.*—In suit against a railroad company for damages to crops, caused by the failure of defendant to fence its line of road through plaintiff's premises, where it appeared from the petition that the company had constructed its "road-bed," but no allegation showed that the road was completed, *held*, that though the petition was not good as a pleading framed on the statute (Wagn. Stat. 310, § 43), it set forth a good cause of action at common law, and should be proceeded with. And as a common-law action it was not demurrable because it asked for a judgment for double damages. The character of a petition is not always determined by the relief it prays for. The court may grant any relief consistent with the case and embraced in the issues.—*Id.*
10. *Corporations—Railroad—Dissolution—Act to foreclose the State's lien.*—A corporation may be dissolved by a surrender of its franchises, and if a corporation suffers acts to be done which have the effect of destroying the end and object for which it is created, it is equivalent to a surrender of its right.—*Moore v. Whitcomb*, 543.
11. *Corporations—Railroads—Cairo & Fulton Railroad, seizure and sale of.*—The seizure and sale of the Cairo & Fulton Railroad under the State lien extinguished the Cairo & Fulton Railroad Company, such seizure and sale destroying the objects for which the corporation was instituted. (Answers to questions, etc., 37 Mo. 135, cited and affirmed.)—*Id.*
12. *Damages—Railroad companies—Accident in towns—Public highway.*—Notwithstanding the provisions of article v of the act touching damages (Wagn. Stat. 520), the law will not presume the negligence of a railroad company from the killing of stock within the corporate limits of a town or city, especially when the accident happened at a crossing long used as a public highway. (See Wagn. Stat. ch. 37, art. II, § 43.)—*Wier v. St. Louis & Iron Mountain R. R. Co.*, 558.

See CONSTITUTION OF MISSOURI, 2.

RATIFICATION.

See CONTRACTS, 3.

RECORDS.

1. *Records, lost, ordinarily may be proved by parol evidence.*—Ordinarily, if a record be lost, its contents may be proved, like any other document, by secondary evidence, when the case does not, from its nature, disclose the existence of other and better evidence.—*Foulk v. Colburn*, 225.

See LANDS AND LAND TITLES, 5.

REFEREE.

See PRACTICE, CIVIL—TRIALS, 4.

REGISTRATION.

1. *Registration, board of—Witnesses before, not entitled to fees.*—Persons summoned as witnesses before a board of registration held in a given county under the registration act of 1866 (Gen. Stat. 1865, pp. 908-9, §§ 20, 27), are not entitled to payment of witness fees from the county. Said sections authorize no such payment, and the county cannot be held liable therefor without some express statute to that effect. The registration officers cannot bind the county as its agents by their act in summoning the witnesses. They are not agents of the county, but of the State. The county is no party to the proceeding.—*Finney v. Sullivan County*, 350.

RES ADJUDICATA.

See JUDGMENTS, 1; PRACTICE, SUPREME COURT, 12, 13

RES GESTÆ.

See EVIDENCE, 1.

REVENUE.

1. *Revenue—Taxation, repeal of temporary rate of—Power of Legislature, etc.*—As a general proposition, there can be no doubt of the power of the Legislature to repeal a temporary rate of taxation and impose another and higher rate, or additional taxes, by virtue of the State sovereignty over the whole subject of taxation, unless there has been some express contract in limitation of the power, upon a consideration deemed to be a part of the value of the grant or the charter.—*State, to use of Pacific R.R., v. Dulle*, 282.
2. *Revenue—Pacific Railroad liable for county taxes—Construction of statute.*—Although, by the amended charter of the Pacific Railroad Company (Sess. Acts 1851, p. 271, § 6) and the laws applicable to said road (Sess. Acts 1853, p. 13, § 12), provision was simply made for the payment by the corporation of State taxes, nevertheless, under the constitution (art. II, § 16) and the General Statutes (Wagn. Stat. 1159-61, §§ 1-9), the company was liable for its county taxes.—*Id.*
3. *Revenue—County collector a ministerial officer—Where assessor has jurisdiction, collector protected in making levy, etc.*—The office of county collector is a ministerial one, and where an action of trespass is brought against a county collector for levying upon and seizing property for unpaid taxes, if it appear that the assessor has jurisdiction over the property—i. e. that it is liable to taxation in any form—then the collector will be protected notwithstanding irregularities in the mode of assessment.—*Id.*
4. *Schools—Taxes—Laws in force in 1863 authorized school corporations to include as taxable merchants' statements.*—Under the laws in force in 1869 (Sess. Acts 1868, p. 76; Wagn. Stat. 938-9, § 6; Sess. Acts 1867, pp. 161-2, §§ 7, 8; Wagn. Stat. 1264-5, §§ 7-9; see also *id.* 1246, § 18, and 1243, § 6), school corporations in towns and villages were authorized to

REVENUE—(Continued.)

include merchants' statements as taxable, and to collect school taxes upon such statements.—State ex rel. Kidder School District v. Kinney, 373.

5. *Injunction—County collector—Void levy—Trespass.*—A collector cannot be enjoined from enforcing the collection of a tax on a void levy. In such case the officer would be a mere trespasser, and the injured party would have an ample remedy at law.—McPike v. Pew, 525.
6. *Revenue—Tax deed—Printed notice of sale of delinquent lands required, when—Construction of statute.*—The putting up of written instead of printed notices of the sale of land for non-payment of taxes is not a sufficient compliance with the first clause of section 2, page 85, Adj. Sess. Acts 1863; and a tax deed which recites simply the posting of written advertisements is void and conveys no title. Advertisement in the time and manner prescribed by law is a prerequisite to the validity of a tax title, and this principle is not altered because judgment is required by law to be entered up in the County Court. The notice is the indispensable prerequisite, and without it the court has no jurisdiction in the premises.—Lagroue v. Rains, 536.

See RAILROADS, 1, 2.

ROADS, COUNTY.

See BONDS, COUNTY, 1, 2.

S

SALES.

1. *Sales under military authority, validity of—Valid condemnation or military usage must be shown.*—The act of a public officer is not necessarily that of the government he represents, and it is only so when he follows the law. The government can only act through the law. When obeying the law, its agents properly represent it, and on the seizure and sale of property the law transfers the title. In order to protect the title under a sale by a provost marshal, under color of military authority, the claimant under such sale must show that the property was sold under some valid condemnation or judgment, or that its seizure and sale was authorized by the usages of war; otherwise the action of the provost marshal was a mere trespass.—Bowles v. Lewis, 32.
2. *Deed of trust—Sale, notice of—"Public place," what is.*—The setting up of notice of sale on the sides of a public square in a town or city satisfies the requirement contained in a deed of trust, that the notice should be put up in a "public place" in such town or city.
The recitals by the trustee in his deed, that he put up the notices in "public places," are sufficient *prima facie* evidence of that fact.—Carter v. Abshire, 300.
3. *Deed of trust, sale under—When land should be sold in lump, when in parcels.*—When property for sale under a deed of trust will bring more by being sold in separate subdivisions, it is the duty of the trustee to pursue that course, whether the deed contains a direction to that effect or not. But he must sell it in the lump or in parcels, according as will be most beneficial for the debtor; and he will be held to a strict accountability for the exercise of the discretion devolved upon him.—Id.
4. *Fraud—Sale of land—Mere inadequacy of consideration not sufficient to charge fraud.*—Mere inadequacy of consideration in the sale of property, of

SALES—(Continued.)

itself, unless so gross as to furnish a reasonable presumption of fraud, would be no ground for the interference of equity.—*Id.*

See COURTS, PROBATE; EXECUTIONS, 5; LANDS AND LAND TITLES, 3; MORTGAGES AND DEEDS OF TRUST, 7, 8; SHERIFFS' SALES.

SALINE COUNTY.

See RAILROADS, 6.

SCHOOLS.

1. *Eminent domain—Appropriation of property for local schools constitutional.*—An appropriation of property for the use of a local school (see Wagn. Stat. 1244, 1247, §§ 12, 20; *id.* 327, 328, §§ 3, 4) is an appropriation of it to a public use, within the meaning of section 16, article I, of the State constitution.—*Township Board of Education v. Hackmann*, 243.

2. *Schools—Taxes—Laws in force in 1868 authorized school corporations to include as taxable merchants' statements.*—Under the laws in force in 1869 (Sess. Acts 1868, p. 76; Wagn. Stat. 938-9, § 6; Sess. Acts 1867, pp. 161-2, §§ 7, 8; Wagn. Stat. 1264-5, §§ 7-9; see also *id.* 1246, § 18, and 1243, § 6), school corporations in towns and villages were authorized to include merchants' statements as taxable, and to collect school taxes upon such statements.—*State ex rel. Kidder School District v. Kinney*, 378.

SECRETARY OF STATE.

1. *Secretary of State—Action against, under statute—Plaintiff need not be legally qualified.*—The plaintiff in an action against the Secretary of State for failure or refusal to open returns and cast up votes, if the suit be brought on his general official bond, must first show himself entitled to the office. But under the statute relating to that officer (Wagn. Stat. 1272, § 15), the plaintiff may properly sue, although not lawfully elected. Within the meaning of that section he may be "aggrieved" by such failure or refusal, whether elected or not. The object of that provision is not to compensate a sufferer for the loss of office; but the liability which it imposes is in the nature of a penalty for misfeasance, of which the officer may be guilty, by reason of failure to canvass votes, although the party aggrieved received a minority of votes.—*Switzler v. Rodman*, 197.

SHERIFF.

See SURETIES, 4; SHERIFFS' SALES.

SHERIFFS' SALES.

1. *Conveyances—Sheriff's deed—Amended deed should be made, when—Effect of amendment on former deed—Innocent purchasers, who are.*—It is the right and duty of a sheriff to amend a defective deed when the facts will warrant him in so doing, and the amended deed will relate back to the date of the original one.

In such case the former deed may be first set aside on motion. But the last and correct deed is not void because the imperfect deed was not first set aside.

A purchaser of the land between the date of the first and second deeds will be affected by the latter only where he had either actual notice of the facts therein recited, or notice of such recorded proceedings as would advise him of them.

Where A. purchased at sheriff's sale and went into open, notorious possession of the premises, of which fact B. was aware, but, learning that the title

SHERIFFS' SALES—(Continued.)

- was defective by reason of infirmities in the sheriff's deed, proceeded to bid off the property under another judgment for a nominal sum, to say that B., in such a case, was a stranger, and should be protected as an innocent purchaser from the operation of a second and amended sheriff's deed to A., would confound all ideas as to what constitutes innocence either in an actual or moral sense.—*Thornton v. Miskimmon*, 219.
2. *Sheriff, deed of land by—Omission in to state the date of levy under the attachment—Failure of date may be supplied by parol evidence.*—In a suit for certain real estate, carried on between two purchasers under different attachment sales, to test the priority of their claims, it appeared that the sheriff's deed to defendant failed to set forth the date of the attachment and levy; that, without defendant's fault, a portion of the original files in the suit had been lost, but that enough of the record remained to advise plaintiff that there had been a writ of attachment and levy. *Held*, that the sheriff's deed was not vitiated by the failure to recite the original levy; that proof of the date of the levy might be made by parol evidence; and that, on such proof, the deed would relate back to the time of the levy.—*Foulk v. Colburn*, 225.
 3. *Conveyances—Sheriff's deed, defective acknowledgment of—Not aided by record.*—The record of a certificate of acknowledgment to a sheriff's deed, made by the clerk of a Circuit Court (Wagn. Stat. 612 § 56), is inadmissible to sustain an original acknowledgment thereof, where the latter was defective.—*Samuels v. Shelton*, 444.
 4. *Conveyances—Acknowledgment—Clerical error.*—A certificate of acknowledgment indorsed on the back of a sheriff's deed is not invalid because it recited that "he appeared in court and acknowledged that he executed and delivered a deed for the uses," etc., and did not specifically refer to the deed acknowledged. No material or necessary part of the certificate was omitted, and the intention was sufficiently clear on the face of the paper.—*Id.*
 5. *Conveyances—Seal—Scrawl sufficient.*—In a sheriff's deed, a scrawl appended to his name, with the word "seal" written therein, is, under the laws of this State, a sufficient seal.—*Id.*
 6. *Sheriff's deed prima facie evidence of the truth of its recitals.*—Where execution issues from the circuit clerk's office on a justice's transcript, and the land is sold by the sheriff, the recitals in his deed are *prima facie* evidence of the judgment and execution in the justice's court, and of the other facts recited, without the necessity of producing the transcript to prove the facts. But the recitals may be invalidated or destroyed by the party resisting the deed.—*Id.*
 7. *Conveyance—Acknowledgment of by deputy, sheriff in his own name invalid.*—An acknowledgment to a deed, of land sold under execution, made by a deputy sheriff in his own name, is invalid.—*Id.*

SLANDER.

2. *Slander—Words imputing immoral or indictable offense actionable in themselves.*—Words imputing the commission of an immoral and indictable offense are actionable in themselves; and in such case the law will infer malice, and there is no necessity of proving it.—*Barbee v. Hereford*, 323

See **LIBEL**.

SPECIAL LEGISLATION.

See CONSTITUTION OF MISSOURI, 1.

SPECIFIC PERFORMANCE.

See CONTRACTS, 7.

ST. LOUIS, CITY OF.

1. *St. Louis, city of—Ordinances concerning contracts for lighting, etc., the street lamps, how construed.*—Section 1, article VI (p. 342), of the Revised Ordinances of the city of St. Louis (Revision of 1866), which provides that "The city engineer is hereby authorized to contract in the same manner as for other city work, for the cleaning, lighting and repairing of the public street lamps," refers back to section 5, article I, of ordinance 5399 (Revision of 1866, p. 320), which provides that "all public works ordered by the city, unless otherwise directed, shall be let by the city engineer to the lowest and best bidder," and provides the modes of advertising, making specifications and receiving bids. And a contract made without compliance with these provisions is invalid.—State ex rel. Dunn v. Barlow, 17.
2. *St. Louis, city of—Ordinance concerning contracts for lighting street lamps, how affected by amended charter.*—The amended charter of the city of St. Louis, adopted March 4, 1870, provides by law for the mode of letting public work. Section 17, article VIII, of said charter forbids the city council from making contracts directly for public work, etc., and directs the city engineer to prepare plans, profiles and estimates, and, under the direction of ordinances, to advertise for bids and let the work by contract to the lowest and best bidder. After the adoption of this charter, the provisions of the ordinance requiring the engineer to contract for lighting the public street lamps in the same manner as for other city work, although adopted before the passage of the amended charter, can have reference only to the mode provided in such amended charter.—Id.

See PRACTICE, CRIMINAL, 7, 8.

STATUTE, CONSTRUCTION OF.

ADMINISTRATION, 2 (Wagn. Stat. 77, § 47).

ATTACHMENT, 3 (R. S. 1825, p. 144).

BONDS, COUNTY, 2 (Sess. Acts 1865, p. 120, § 13).

COUNTIES, 1 (Wagn. Stat. 787, §§ 19, 20).

COURTS, COUNTY, 1 (Wagn. Stat. 439, §§ 1, 2).

DEDICATION TO PUBLIC USE, 1 (Wagn. Stat. 1328, § 8; id. 1315, § 7).

DOWER, 1 (Wagn. Stat. 542, § 21).

EMINENT DOMAIN, 1 (Wagn. Stat. 1244, 1247, §§ 12, 20; id. 327-8, §§ 3, 4; Const. of Mo., art. I, § 16).

GARNISHMENT, 1 (Wagn. Stat. 664, § 37).

HUSBAND AND WIFE, 6 (Wagn. Stat. 935, § 14; R. C. 1855, p. 754).

JEOPAILS, 1 (Wagn. Stat. 1036, § 19).

JUDGMENTS, 4 (Wagn. Stat. 420, § 15).

LANDLORD AND TENANT, 1 (Wagn. Stat. 882, § 33).

MANDAMUS, 1 (Wagn. Stat. 849, § 10).

MECHANICS' LIEN, 1 (R. C. 1855, p. 1068, § 7).

MORTGAGES AND DEEDS OF TRUST, 10 (Wagn. Stat. 955, § 10).

PACIFIC RAILROAD, 1 (Sess. Acts 1851, p. 271, § 6; Sess. Acts 1853, p. 13, § 12; Wagn. Stat. 1159-61, §§ 1-9).

STATUTE, CONSTRUCTION OF—(Continued.)

- PARTITION, 1 (Wagn. Stat. 967, § 8).
- PENITENTIARY, 1 (Wagn. Stat. 983-5, §§ 2, 5, 6, 15, 17).
- PETTIS COUNTY WARRANTS, 1 (Sess. Acts 1868, p. 42).
- PRACTICE, CIVIL, 1 (Wagn. Stat. 1036, § 19).
- PRACTICE, CIVIL—APPEAL, 3 (Wagn. Stat. 1059, § 11).
- PRACTICE, CRIMINAL, 2 (Wagn. Stat. 1336, § 24; Sess. Acts 1870, p. 29), 5 (Wagn. Stat. 1120, § 28), 11 (Wagn. Stat. 516, § 32), 12, 13 (Wagn. Stat. 504, § 30), 13 (Wagn. Stat. 516, § 32).
- PRACTICE, SUPREME COURT, 8 (Wagn. Stat. 1043-4, §§ 28, 30, 32, 34).
- PUBLIC PRINTER, 1 (Sess. Acts 1870, p. 79).
- RAILROADS, 1, 2 (Sess. Acts 1849, p. 222, § 14), 2 (Sess. Acts 1853, p. 121, § 30), 5 (Gen. Stat. 1865, ch. 63, § 43), 6 (Sess. Acts 1861, p. 455), 7 (Wagn. Stat. 520, § 5), 8, 9 (Wagn. Stat. 310, § 43).
- REGISTRATION, 1 (Gen. Stat. 1865, pp. 908-9, §§ 20, 27).
- REVENUE, 6 (Adj. Sess. Acts 1863, p. 85, § 2).
- SCHOOLS, 2 (Sess. Acts 1868, p. 76; Wagn. Stat. 938-9, § 6; Sess. Acts 1867, pp. 161-2, §§ 7, 8; Wagn. Stat. 1264-5, §§ 7, 9; *id.* 1243, § 18; *id.* 1246, § 18).
- SECRETARY OF STATE, 1 (Wagn. Stat. 1272, § 15).
- SHERIFFS' SALES, 3 (Wagn. Stat. 612, § 56).
- SURETIES, 5 (Wagn. Stat. 1302, § 1).
- SWAMP LANDS, 1 (Sess. Acts 1869, p. 66), 2 (Gen. Stat. 1865, ch. 46, § 81; Wagn. Stat. 1259, § 79).
- USURY, 1 (Adj. Sess. Acts 1855, p. 149, § 3).
- WILLS, 4 (Wagn. Stat. 93, § 1), 5 (Wagn. Stat. 1385, § 9), 6 (Wagn. Stat. 1368, § 29), 7 (Wagn. Stat. 1372-3, §§ 1-5).

STOCK.

See CORPORATIONS, 4; RAILROADS, 1, 2, 7, 8.

STREETS AND ALLEYS.

See DEDICATION TO PUBLIC USE.

STREET LAMPS.

See ST. LOUIS, CITY OF, 1, 2.

SUNDAY.

See BILLS AND NOTES, 4; PRACTICE, CRIMINAL, 9, 10, 11, 12.

SURETIES.

1. *Corporations, officers of—Loan by, of money of the corporation without authority—Responsibility of sureties.*—When an officer of a corporation loans money of the corporation without authority, and has failed to account for it, his sureties are liable thereupon, whether the persons to whom he loaned it are solvent or not.—*Western Boatmen's Benevolent Association v. Kribben*, 37.
2. *Corporations, powers of—Liability of agents—Sureties.*—A corporation can only exercise the powers expressly granted by its charter, or necessary to carry out some express power; and therefore a surety for one as agent for a corporation is limited to such acts as the corporation is authorized to require of its agents. But where the corporation grants powers "to buy, exchange, sell, mortgage, transfer, or otherwise use its property," under these powers it might legally loan out its surplus funds, and the right to accept security for

**SURETIES—(Continued.)**

such loan follows as a necessary incident; and where gold was deposited with a corporation as collateral security for a loan, the title thereto vested lawfully in the corporation; and where an agent of the corporation converted such gold to his own use, his sureties are liable therefor.—*Id.*

3. *Corporations—Officers, bonds of—Variation in style of office.*—Where an official bond of an officer of a corporation was given for the faithful performance of his duties as treasurer, and the charter designates the officer as "secretary, who shall act as treasurer," *held*, that the sureties on its bond were liable for defalcations which occurred while he was acting as treasurer.—*Id.*
4. *Sureties—Note—Payment of by principal—Subrogation.*—The sureties of a sheriff who were compelled to pay over to certain heirs the amount due them by him on the sale of the lands in partition, may be joined with the sheriff's administrator as plaintiffs in suit on the note given for the purchase of the land. Having under compulsion paid the beneficiaries of the note the sum due them, the sureties were entitled to succeed to their rights, and payment of the amount due should be made to the sureties.—Sweet, *Adm'r of Jones, v. Jeffries*, 279.
5. *Surety—Notice by to sue, when not in writing, is no protection to.*—Notice by a surety on a note to the holder thereof to sue, when not in writing, is not binding upon the holder, either under the statute (Gen. Stat. 1865, p. 406, § 1; Wagn. Stat. 1302, § 1) or at common law; and his neglect to comply with such notice will not release the surety.—Langdon v. Markle, 357.

SURVIVORSHIP.

See **HUSBAND AND WIFE, 1.**

SWAMP LANDS.

1. *Swamp lands—Register of lands, duty of, as to the issue of patents of swamp lands to counties.*—The act of March 10, 1869 (Sess. Acts 1869, p. 66), entitled "An act in relation to swamp and overflowed lands," which directs the register of lands to prepare a patent or patents embracing all the swamp and overflowed lands lying within the limits of the several counties of the State, conveying thereby all the title of the State of Missouri in such lands to the counties in which such lands may lie, does not empower that officer to issue to one county patents of lands lying in another. It confers upon him no authority to take jurisdiction of and adjudicate on the rights of rival claimants. He must look at the county lines as they existed at the date of the passage of the act, and be guided by them in the issue of patents to the respective counties.—State ex rel. Ripley County v. Register of Lands, 59.
2. *County Court, clerk of—Swamp lands—Stray act—Construction of statute.*—Notwithstanding the provisions of section 81, ch. 46, Gen. Stat. 1865, and Wagn. Stat. 1259, § 79, it is not the duty of the clerk of a County Court to collect the proceeds arising from the sale of swamp lands, or of "section 16," or moneys received under the stray act, and the sureties on his official bond cannot be held for the amount of moneys so collected by him, and not paid over as required by law.

A proper interpretation of section 81 does not authorize the county clerk to receive the money, but imposes upon him, as the keeper of the public accounts and the custodian of the evidences of indebtedness, to see that collections are enforced.—State v. Modler, 331.

SWAMP LANDS—(Continued.)

3. *Mandamus will issue against county judges for payment of warrants drawn on swamp land fund.*—In proceedings before the Circuit Court for *mandamus* against the judges of the County Court, requiring payment of warrants ordered by them and drawn on the "swamp land" fund, where the return sets up no equitable excuse for the conduct of the County Court—as that the warrants had been wrongfully obtained or issued in payment of a claim improperly audited—the writ will issue; and it cannot be objected that no judgment had been first obtained against the County Court on the claim evidenced by the warrants; for being drawn on a special fund, such judgment could not be obtained.

Were the proceedings appealable to the Circuit Court, *mandamus* would not lie; since that remedy is afforded only when others fail. But being an attempt to induce the payment of claims already audited, there was nothing in regard to which an appeal would lie.—*State ex rel. Zimmerman v. Bollinger County Court*, 475.

T

TAX.

See REVENUE.

TRANSCRIPT.

See PRACTICE, SUPREME COURT, 1, 2, 4.

TRESPASS.

1. *Trespass—Damage quare clausum fregit—Domestic stock—Allegations as to scienter.*—The doctrine is well settled that where an action of trespass or case is brought for mischief done the person or personal property of another by animals *mansuetæ naturæ*, such as horses, cattle, sheep and swine, the petition must show that the owner had notice of their viciousness before he can be charged for the mischief done, because such animals are not by nature fierce or dangerous. But an action of trespass done by such stock, by breaking and entering the close of another, need not allege that defendant knew of the propensity in them to wander and roam about, which would naturally produce such damage, because animals of that description are by nature notoriously prone to such habits, and defendant will be presumed to have known them. And any mischief done by them, after entering the close, may be alleged and recovered upon as aggravation.—*Beckett v. Beckett*, 396.

See REVENUE, 5.

TRUSTS.

See CONTRACTS, 5; MORTGAGES AND DEEDS OF TRUST.

U

UNLAWFUL DETAINER.

1. *Unlawful detainer—Worm fence partly resting on land of adjoining proprietor, etc.*—Where one erects a worm or Virginia fence to separate his land from that of an adjoining owner, half of the width of the fence may rest upon the land of the latter, the fence being of suitable dimensions; and unlawful detainer will not lie against the builder for the land so occupied beyond the dividing line.—*Pettigrew v. Lancy*, 380.

USES.

See TRUSTS.

USURY.

1. *Interest — Usury — Loans — Purchaser of commercial paper — Boatmen's Savings Institution.*— Under the charter of the Boatmen's Savings Institution of St. Louis (Adj. Sess. Acts 1855, p. 149, § 3), the discounting of commercial paper by the bank constituted a loan, and discount at the rate of over eight per cent. reserved would amount to usury. But the bank might purchase bills of exchange at whatever rates might be agreed on between itself and its customers. Usury has no application to such transactions. To constitute usury there must be an express or implied loan. And an allegation that the bank simply purchased bills at figures exceeding the current rates of exchange, with a view to evading the charter restrictions as to interest, would be held on demurrer insufficient to charge usury.— *State ex rel. Attorney General v. The Boatmen's Savings Institution*, 186.

W

WAGES.

See GARNISHMENT, 1.

WARRANTS, COUNTY.

See PETTIS COUNTY WARRANTS.

WILLS.

1. *Wills, proceedings to test validity of — Transfer from Probate to Circuit Court.*— Proceedings to test the validity of a purported will are originally within the jurisdiction of the Probate Court where the will was originally probated and ordered to record. Such proceedings are *in rem*, operating directly upon the will—the *res*; and a transfer of the case to the Circuit Court does not change its character or the character of its subject-matter, and the jurisdiction of the Circuit Court, upon such transference, not being original, is derivative in effect, as on appeal; and after such transference the proceedings could not be dismissed by the contestants without prejudice to them—that is, without an affirmance of the prior judgment.— *Benoist v. Murrin*, 48.
2. *Wills, proceedings to contest — Contestants not allowed to dismiss without prejudice.*— It has been repeatedly held that in proceedings to establish a will, those in the affirmative cannot take a nonsuit, and that it is the right of the contestant to insist upon a verdict. If the contestants in that case insist on the proceedings going forward to a verdict, certainly those upon whom is thrown the burden of establishing an instrument assailed and drawn in question by the action of the contestants, ought to have the same privilege.— *Id.*
3. *Wills, proof of — Probate Court, judgment of, how impeached.*— The judgment of a court probating a will is like the judgment of any other court of competent jurisdiction, and cannot be impeached collaterally. It matters not that the court erred, or that the evidence upon which it was founded was not sufficient to justify it. That would simply constitute an error in the proceedings of the court rendering it. But the judgment would be valid until reversed, annulled, or set aside in the proper manner. The evidence is no part of the judgment, and whether it was rendered upon sufficient or legal evidence can only be inquired into by a direct proceeding. The evidence

WILLS—(Continued.)

does not confer jurisdiction upon the court; it is merely the means by which the conclusion is arrived at.—*Dilworth v. Rice*, 124.

4. *Wills—Powers—Execution, by administrator with will annexed, of power not executed by the executor in whom it was vested by the will.*—Under section 1, article III, chapter 2, Wagn. Stat. 93, an administrator with the will annexed can legally and effectively execute a power of sale of lands which was vested by the testator in the executor named in the will, when such executor has died without executing the power, and when the will absolutely directs that the lands shall be sold, and no confidence or trust is reposed specially in the executor named, although the power may be accompanied by and involve the exercise of a discretion.—*Id.*
5. *Wills—Descents and distribution—Heir not mentioned in will takes, when.*—In order to prevent an heir not provided for in a will from taking his distributive share, under section 9 of the statute concerning wills (Wagn. Stat. 1385), the will must show on its face that the testator remembered him. He need not be directly named in the will, but it must contain provisions or language that point directly to him. Thus it cannot be inferred that, because the testator provided for the payment of debts due two of his children, he intended to disinherit the rest.—*Pounds v. Dale*, 270.
3. *Will, suit to contest validity of—Issues framed—Construction of statute—Burden of proof on whom.*—In a proceeding under the statute to contest the validity of a will, it is error for the court to refuse, on motion of counsel, to frame an issue for the jury as to whether or not the writing produced was the will of the testator. (Wagn. Stat. 1368, § 29.)
In such a suit the *onus* is on the defendants who seek to establish its validity, and they are entitled to open and close.—*Tingley v. Cowgill*, 291.
7. *Will, suit to contest validity of—Wife may testify in.*—In an action to contest the validity of a will, the wife is not precluded from testifying by reason of anything contained in the statute concerning witnesses (Wagn. Stat. 1372-3, §§ 1-5). That act contemplates cases where the husband is the real party in interest; whereas, in the case supposed, the wife is the real and the husband merely a nominal party.—*Id.*
8. *Wills—Undue influence—Bad treatment of children, proof touching.*—Mere bad treatment of children, exerted or exercised by the wife many years previous to the making of a will, although coupled with their disinheritance by the testator, does not necessarily furnish a reason for impeaching its validity. It should be followed up by proof showing that undue influence was acquired by her in consequence, and that the influence continued down to the time when the will was executed.—*Id.*
9. *Will, suit to invalidate—Testator, declarations of.*—In an action to contest the validity of a will, declarations of the testator made before the date of the will are inadmissible. (*Gibson v. Gibson*, 24 Mo. 227.)—*Id.*

WITNESSES.

See EVIDENCE; REGISTRATION, 1.